BRUCE COCKAYNE ET AL. *v.* THE BRISTOL HOSPITAL INCORPORATED ET AL.
(AC 44241)

Prescott, Alexander and Bishop, Js.

Syllabus

The plaintiffs, B and his wife, sought to recover damages from the defendant hospital for, inter alia, injuries B allegedly sustained while he was receiving treatment from the defendant's employees. Over a three day period, two of the defendant's nurses, K and L, administered medication to B rectally via enema a total of three times. On the day following the final administration, a physician discovered that B's rectum had been perforated. As a result, B developed a necrotizing infection and sepsis, his health deteriorated, and he required multiple medical procedures. At trial, after the plaintiffs had rested, the defendant moved for a directed verdict, claiming that the plaintiffs had failed to present an evidentiary basis as to when the perforation occurred, which of the defendant's employees had breached the applicable standard of care, and whether the tip of the enema was capable of causing the perforation. The trial court reserved its decision on the motion and permitted the issues to be submitted to the jury. The jury returned a verdict in favor of the plaintiffs and the defendant filed motions for judgment notwithstanding the verdict and to set aside the verdict. The trial court denied both motions and the defendant appealed to this court. *Held*:

1. The trial court properly denied the defendant's motion for judgment notwithstanding the verdict: this court, determining that the issue was subject to plenary review because the question of whether the evidence was sufficient to withstand the motion was one of law, concluded that the plaintiffs had met their burden of producing sufficient evidence for the jury to find that the enema was physically capable of causing the perforation, as an expert testified regarding the average length of the anal canal and the length of the tip of the enema, stating that it could reach into the rectum and that it was possible for the tip to go through the rectum and cause the perforation suffered by B; moreover, the defendant did not provide any authority for its assertion that the plaintiffs needed to provide specific evidence regarding B's actual anatomical measurements, and the experts were not required to disprove all other possible explanations for the injury but only needed to show that their opinions were based on reasonable probabilities; furthermore, the use of a differential diagnosis was proper and sufficient to establish the plaintiffs' theory of causation, namely, that the defendant's employees caused the perforation suffered by B, as the jury heard evidence that there was no perforation of B's rectum prior to his hospitalization, that the most likely cause of the perforation was the insertion of a foreign

object, and that, although there were four possible causation events, an expert witness used differential diagnosis to eliminate three of the potential causes and opined that, to a reasonable degree of medical probability, an enema administered during B's hospitalization caused the perforation, and this court and our Supreme Court have indicated that a causal relationship between an injury and its later physical effects may be established by a physician's deduction through the process of eliminating other causes.

2. The trial court properly denied the motion to set aside the verdict, as the defendant could not prevail on its claim that the jury improperly was permitted to consider a theory of negligence unsupported by the evidence: the plaintiffs presented sufficient expert evidence for the jury to find that L caused the perforation of B's rectum, as L administered an enema during the time frame in which the perforation likely occurred, an expert physician testified that the perforation was caused by the administration of an enema with excessive force and indicated that one of the nurses had caused it, and a registered nurse, one of the plaintiffs' experts, testified that K or L had used improper technique in administering the enemas and indicated that L had caused the perforation, although she later clarified her statement to indicate that she could not determine which individual nurse bore sole responsibility for causing the perforation.

Argued May 24, 2021—officially released February 8, 2022

Procedural History

Action to recover damages for medical malpractice, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the matter was tried to the jury before *Morgan*, *J.*; verdict for the plaintiffs; thereafter, the court, *Morgan*, *J.*, denied the defendants' motions for judgment notwithstanding the verdict and to set aside the verdict and rendered judgment in accordance with the verdict, from which the defendants appealed to this court. *Affirmed.*

Tadhg Dooley, with whom were *Jeffrey R. Babbin* and, on the brief, *Michael G. Rigg*, for the appellants (defendants).

Jack G. Steigelfest, with whom were *Thomas P. Cella* and, on the brief, *Brian D. Danforth*, for the appellees (plaintiffs).

Opinion

ALEXANDER, J. The dispositive issue in this appeal is whether the plaintiffs, Bruce Cockayne and Marion Cockayne, presented sufficient evidence in support of their claim of medical malpractice by employees of the defendant The Bristol Hospital Incorporated.[1] Following the jury's verdict in favor of the plaintiffs, the defendant moved for judgment notwithstanding the verdict and to set aside the verdict. The trial court denied these motions and rendered judgment in accordance with the jury's verdict. On appeal, the defendant claims that the court improperly denied (1) its motion for judgment notwithstanding the verdict and (2) its motion to set aside the verdict and order a new trial. We disagree and, accordingly, affirm the judgment of the trial court.

The following allegations from the plaintiffs' complaint underlie this appeal. Count one of the complaint alleged that Bruce Cockayne was admitted to the defendant on February 11, 2014, and, during this admission, he received treatments of a medication administered rectally via enema. During one or more of these treatments, his rectum was perforated. The plaintiffs alleged that this perforation was proximately caused by the carelessness and negligence of the defendant's agents, servants, or employees.[2] Further, the plaintiffs claimed

[1] In their complaint, the plaintiffs named both The Bristol Hospital Incorporated and Bristol Hospital and Health Care Group, Inc., as defendants. During its charge to the jury, the trial court explained: "While these defendants are separate legal entities, they shall be treated as one and the same for purposes of this trial. As I continue with these instructions, I will refer to both defendants collectively as the defendant or Bristol Hospital." For the sake of consistency, we will follow the approach taken by the trial court and refer to the two entities named in the plaintiffs' complaint as "the defendant" in this opinion.

[2] The complaint set forth the following: "[Bruce Cockayne's] injuries, losses and damages were proximately caused by the carelessness and negligence of [the defendant], by and through its agents, servants or employee[s], in one or more of the following ways, in that they:

"a. perforated [Bruce Cockayne's] rectum during the course of enema administration when, in the exercise of reasonable care, [his] rectum should not have been perforated;

that, due to this carelessness and negligence, Bruce Cockayne had to undergo numerous surgeries, procedures, diagnostic tests, therapies, and the administration of medications. These medical treatments caused him to suffer extreme physical and mental pain and suffering, to incur medical expenses and to have his ability to enjoy life's pleasures curtailed and diminished. Count two of the complaint set forth a loss of consortium claim on behalf of Marion Cockayne.[3]

Following the presentation of the evidence, the jury reasonably could have found the following facts. In January, 2014, Bruce Cockayne experienced symptoms of diarrhea and vomiting. At that time, he was admitted to the defendant for treatment consisting of bedrest, medication, and a colonoscopy. At this time, his rectum was described as "largely intact . . . ." Bruce Cockayne was discharged from the defendant on February 3, 2014. He was prescribed Rowasa enemas to be administered at home.[4] Marion Cockayne attempted to administer this type of enema to her husband but was unsuccessful due to his irritation and pain. During the time

"b. permitted an agent, servant or employee of the defendant to perform the administration of an enema when said person was inadequately trained and/or lacked the experience and knowledge to do so;

"c. permitted an agent, servant or employee of the defendant to perform the administration of an enema when the use of an enema was contraindicated by the condition of [Bruce Cockayne's] rectum;

"d. failed to discover in a timely manner the perforated rectum;

"e. failed to discover and repair the perforation in a timely manner;

"f. failed to appreciate the signs and symptoms of a perforated rectum during the course of [Bruce Cockayne's] admission; and/or

"g. failed to take appropriate measures in light of the signs and symptoms of a perforated rectum."

[3] See, e.g., *Ashmore* v. *Hartford Hospital*, 331 Conn. 777, 791–93, 208 A.3d 256 (2019) (loss of consortium claim involves recognition of intangible elements of domestic relations, such as companionship and affection); *Hopson* v. *St. Mary's Hospital*, 176 Conn. 485, 495–96, 408 A.2d 260 (1979) (recognizing claim of married person whose spouse has been injured by negligence of third party).

[4] The evidence at trial established that Rowasa enemas are used to administer a medication, mesalamine, to treat inflammation in patients with Crohn's disease or inflammatory bowel disease.

period of February 2 through 10, 2014, no foreign body was inserted into Bruce Cockayne's rectum.

On February 11, 2014, Bruce Cockayne was readmitted to the defendant after fainting, likely due to continued diarrhea and the resulting loss of fluids. At approximately 9:45 p.m. on February 11, 2014, and approximately 8 p.m. on February 12, 2014, Jordan Kaine, a nurse employed by the defendant, administered a Rowasa enema to Bruce Cockayne in the course of her employment duties. At approximately 8 p.m. on February 13, 2014, Elaine Medina Lapaan, a nurse employed by the defendant, administered a Rowasa enema to Bruce Cockayne in the course of her employment duties.[5]

On the morning of February 14, 2014, Bruce Cockayne suffered a "massive rectal bleed" and was transferred to the intensive care unit. An embolization procedure successfully stopped the bleeding. Following a CT scan, Rainer Bagdasarian, a physician, operated on Bruce Cockayne and performed, inter alia, an endoscopy. During this procedure, Bagdasarian determined that an internal hemorrhoid located on the left lateral anal canal caused the bleeding.[6] Bagdasarian also discovered that, just past the end of the anal canal and distinct from the internal hemorrhoid, "there was a large, two centimeter, older appearing perforation in the posterior right rectum . . . ." Bagdasarian performed an ileostomy to divert feces away from the perforation and to prevent

[5] Before the plaintiffs called their first witness, the parties stipulated that the defendant employed Lapaan and Kaine, the nurses involved in the case, and that they acted within the scope of their employment at all relevant times. The court iterated this stipulation during its charge to the jury. See, e.g., *Krause* v. *Bridgeport Hospital*, 169 Conn. 1, 4, 362 A.2d 802 (1975); *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, 175 Conn. App. 692, 703 n.4, 168 A.3d 538, cert. denied, 327 Conn. 960, 172 A.3d 801 (2017).

[6] A brief description of the relevant anatomy is helpful. The sigmoid colon connects to the rectum at the rectosigmoid junction and the rectum connects to the anal canal at the anorectal line. The anal canal terminates at the anal orifice, where fecal matter is expelled from the body.

it from spilling into the perineum, the space outside ofthe rectum.[7] Despite this effort, Bruce Cockayne developed a necrotizing infection and his health deteriorated precipitously due to sepsis. He required numerous medical procedures at multiple facilities, including Hartford Hospital and Gaylord Hospital.[8]

On July 29, 2016, the plaintiffs commenced the present action against the defendant. Specifically, they claimed that the defendant was vicariously liable[9] for the negligence of its employees who perforated Bruce Cockayne's rectum during the course of an enema administration. The complaint also set forth Marion

[7] An ileostomy has been defined as follows: "Establishment of a fistula through which the ileum [the longest portion of the small intestine] discharges directly to the outside of the body." Stedman's Medical Dictionary (27th Ed. 2000) p. 874.

[8] For example, Kristy Thurston, a board certified colorectal surgeon at Hartford Hospital, testified that, following Bruce Cockayne's transfer to Hartford Hospital, she and her colleagues placed a drain in the infected area and performed a limited colonoscopy to identify any rectal pathology contributing to that infection. Thurston also confirmed the presence of the perforation in Bruce Cockayne's rectum. She described his condition as a "life-threatening situation . . . ." Following his transfer to Gaylord Hospital for rehabilitation and wound care, Bruce Cockayne returned to Hartford Hospital for two additional surgeries. After a period of recovery, Thurston reversed the ileostomy on March 25, 2015.

[9] "Vicarious liability is based on a relationship between the parties, irrespective of participation, either by act or omission, of the one vicariously liable, under which it has been determined as a matter of policy that one person should be liable for the act of the other. Its true basis is largely one of public or social policy under which it has been determined that, irrespective of fault, a party should be held to respond for the acts of another." (Internal quotation marks omitted.) *Alvarez* v. *New Haven Register*, *Inc.*, 249 Conn. 709, 720, 735 A.2d 306 (1999).

In the present case, the vicarious liability of the defendant was premised on the doctrine of respondeat superior. See, e.g., *Ali* v. *Community Health Care Plan*, *Inc.*, 261 Conn. 143, 151, 801 A.2d 775 (2002); *2 National Place*, *LLC* v. *Reiner*, 152 Conn. App. 544, 557–58, 99 A.3d 1171, cert. denied, 314 Conn. 939, 102 A.3d 1112 (2014). "[T]he theory of respondeat superior attaches liability to a principal merely because the agent committed a tort while acting within the scope of his employment." *Larsen Chelsey Realty Co.* v. *Larsen*, 232 Conn. 480, 505, 656 A.2d 1009 (1995).

Cockayne's derivative claim for loss of consortium. A trial was conducted over several days in January, 2020. After the plaintiffs rested, the defendant moved for a directed verdict, claiming that the plaintiffs had failed to present an evidentiary basis (1) as to when the perforation of the rectum had occurred and, therefore, which of the defendant's employees, Lapaan or Kaine, had breached the applicable standard of care and (2) to support their claim that the tip of the Rowasa enema was long enough to cause the perforation. The court reserved its decision on the defendant's motion for a directed verdict and permitted the issues to be submitted to the jury.[10]

On January 24, 2020, the jury returned a verdict in favor of the plaintiffs. As to the medical malpractice claim alleged in count one of the complaint, the jury awarded Bruce Cockayne $382,732.21 in past economic damages and $2,105,027.16 in noneconomic damages. As to the loss of consortium claim alleged in count two of the complaint, the jury awarded Marion Cockayne $720,000.

On March 2, 2020, and in accordance with its prior motion for a directed verdict, the defendant filed a motion for judgment notwithstanding the verdict pursuant to Practice Book §§ 16-35 and 16-37. That same day, the defendant also filed a motion to set aside the verdict and sought a new trial pursuant to Practice Book § 16-35. In two memoranda of decisions dated August 25, 2020, the court denied the defendant's postverdict motions. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly denied its motion for judgment notwithstanding the

[10] See, e.g., *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, 175 Conn. App. 692, 704, 168 A.3d 538, cert. denied, 327 Conn. 960, 172 A.3d 801 (2017).

verdict. It contends that the plaintiffs presented insufficient evidence that either Kaine or Lapaan, the nurses employed by the defendant, negligently caused the perforation in Bruce Cockayne's rectum. Specifically, the defendant argues that the evidence, viewed in the light most favorable to the plaintiffs, failed to prove that (1) the Rowasa enema physically could have caused the perforation in the posterior of the rectum and (2) the defendant's employees negligently administered the enema. The plaintiffs counter that they presented sufficient evidence for the jury to find that the Rowasa enema perforated the rectum and that the perforation was caused by the negligence of one of the nurses in administering the enemas. We agree with the plaintiffs.

As a preliminary matter, we address the applicable standard of review. The parties do not agree on the standard of review with respect to the issues raised in this appeal. The plaintiffs argue that the abuse of discretion standard applies while the defendant contends that our review is de novo. We acknowledge that numerous cases from our appellate courts have referred to the abuse of discretion standard in the context of reviewing the decision of the trial court regarding a motion for judgment notwithstanding the verdict or a motion to set aside the verdict. See, e.g., *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, 318 Conn. 847, 862–63, 124 A.3d 847 (2015); *Ulbrich* v. *Groth*, 310 Conn. 375, 437, 78 A.3d 76 (2013); *Grayson* v. *Wofsey, Rosen, Kweskin & Kuriansky*, 231 Conn. 168, 178, 646 A.2d 195 (1994); *Lappostato* v. *Terk*, 143 Conn. App. 384, 408–409, 71 A.3d 552, cert. denied, 310 Conn. 911, 76 A.3d 627 (2013); *Macchietto* v. *Keggi*, 103 Conn. App. 769, 777, 930 A.2d 817, cert. denied, 284 Conn. 934, 935 A.2d 151 (2007). Nevertheless, we disagree with the plaintiffs that the abuse of discretion standard applies to the defendant's claims.

In the present case, the defendant has challenged the sufficiency of the evidence to support the jury's verdict in its motions for judgment notwithstanding the verdict and to set aside the verdict.[11] The standard for appellate review of the denial of a motion for judgment notwithstanding the verdict is well settled and mirrors the standard applicable to a motion for a directed verdict. "Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision [to deny the defendant's motion for a directed verdict] we must consider the evidence in the light most favorable to the plaintiff. . . . Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party. . . . The foregoing standard of review also governs the trial court's denial of the defendant's motion for judgment notwithstanding the verdict because that motion is not a new motion, but [is] the renewal of [the previous] motion for a directed verdict." (Citation omitted; internal quotation marks omitted.) *Bagley* v. *Adel Wiggins Group*, 327 Conn. 89, 102, 171 A.3d 432 (2017); see also *Haynes* v. *Middletown*, 314 Conn. 303, 311–12, 101 A.3d 249 (2014).

[11] It bears noting that our Supreme Court has instructed that, in this context, "[a] party challenging the validity of the jury's verdict on grounds that there was insufficient evidence to support such a result carries a difficult burden. In reviewing the soundness of a jury's verdict, we construe the evidence in the light most favorable to sustaining the verdict. . . . We do not ask whether we would have reached the same result. [R]ather, we must determine . . . whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . . If the jury could reasonably have reached its conclusion, the verdict must stand." (Internal quotation marks omitted.) *Gagliano* v. *Advanced Specialty Care, P.C.*, 329 Conn. 745, 754, 189 A.3d 587 (2018).

Our Supreme Court has applied the plenary standard of review when reviewing the propriety of a trial court's ruling on a motion for directed verdict based on a claim of insufficient evidence. In *Curran* v. *Kroll*, 303 Conn. 845, 855, 37 A.3d 700 (2012), the trial court granted the defendants' motion for a directed verdict on the basis that the plaintiff failed to present any evidence of a breach of the standard of care in a medical malpractice action. This court reversed the decision of the trial court, concluding that "the evidence presented by the plaintiff at trial would support a reasonable inference that [the defendant physician] had failed to warn the decedent adequately of the signs and symptoms associated with the risks of taking birth control pills." Id. The defendant then appealed to our Supreme Court. Id.

In affirming the decision of this court, our Supreme Court noted the following with respect to the standard of review used in its analysis: "Whether the evidence presented by the plaintiff was sufficient to withstand a motion for a directed verdict is a question of law, over which our review is plenary." Id.; see *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 744, 183 A.3d 611 (2018) ("[w]hether the evidence presented by the plaintiff is sufficient to withstand a motion for a directed verdict is a question of law" subject to plenary review, and " '[a] directed verdict is justified [only] if . . . the evidence is so weak that it would be proper . . . to set aside a verdict rendered for the other party' "); see also *Farrell* v. *Johnson & Johnson*, 335 Conn. 398, 416–17, 238 A.3d 698 (2020); *Pellet* v. *Keller Williams Realty Corp.*, 177 Conn. App. 42, 50, 172 A.3d 283 (2017). We conclude, therefore, that the proper appellate standard in the present case is plenary review.

We also note that "[t]wo further fundamental points bear emphasis. First, the plaintiff in a civil matter is not required to prove his case beyond a reasonable

doubt; a mere preponderance of the evidence is sufficient. Second, the well established standards compelling great deference to the historical function of the jury find their roots in the constitutional right to a trial by jury." (Internal quotation marks omitted.) *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, 175 Conn. App. 692, 716, 168 A.3d 538, cert. denied, 327 Conn. 960, 172 A.3d 801 (2017); see also *Millette* v. *Connecticut Post Ltd. Partnership*, 143 Conn. App. 62, 68, 70 A.3d 126 (2013). Indeed, our Supreme Court has recognized that circumstantial evidence, coupled with the reasonable inferences drawn therefrom, can support a finding of causation in a medical malpractice action. *Console* v. *Nickou*, 156 Conn. 268, 274–75, 240 A.2d 895 (1968). "The test of the sufficiency of proof by circumstantial evidence is whether rational minds could reasonably and logically draw the inference. . . . The proof need not be so conclusive that it precludes every other hypothesis. It is sufficient if the proof produces in the mind of the trier a reasonable belief that it is more probable than otherwise that the fact to be inferred is true." (Citations omitted; internal quotation marks omitted.) Id., 275.

Next, it is instructive to review the relevant legal principles pertaining to claims of medical malpractice. "[T]o prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury. . . . Generally, expert testimony is required to establish both the standard of care to which the defendant is held and the breach of that standard. . . . Likewise, [e]xpert medical opinion evidence is usually required to show the cause of an injury or disease because the medical effect on the human system of the infliction of injuries is generally not within the sphere of the common knowledge of the lay person."

(Citations omitted; internal quotation marks omitted.) *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, supra, 175 Conn. App. 717–18; see also *Rosa* v. *Lawrence & Memorial Hospital*, 145 Conn. App. 275, 303, 74 A.3d 534 (2013); *Hammer* v. *Mount Sinai Hospital*, 25 Conn. App. 702, 717–18, 596 A.2d 1318, cert. denied, 220 Conn. 933, 599 A.2d 384 (1991).[12] We remain mindful, however, that the mere fact that an injury followed a medical procedure is insufficient to establish negligence. *Mozzer* v. *Bush*, 11 Conn. App. 434, 438 n.4, 527 A.2d 727 (1987); see also *Krause* v. *Bridgeport Hospital*, 169 Conn. 1, 8, 362 A.2d 802 (1975).

The defendant's appeal focuses on causation. "All medical malpractice claims, whether involving acts or inactions of a defendant . . . require that a [defendant's] . . . conduct proximately cause the plaintiff's injuries. *The question is whether the conduct of the defendant was a substantial factor in causing the plaintiff's injury.* . . . This causal connection must rest upon more than surmise or conjecture. . . . *A trier is not concerned with possibilities but with reasonable probabilities.* . . . *The causal relation between an injury and its later physical effects may be established by the direct opinion of a physician, by his deduction by the process of eliminating causes other than the traumatic agency, or by his opinion based upon a hypothetical question.* . . .

"[I]t is the plaintiff who bears the burden to prove an unbroken sequence of events that tied his injuries to the [defendant's conduct]. . . . *A plaintiff, however, is not required to disprove all other possible explanations for the accident but, rather, must demonstrate that it is more likely than not that the defendant's negligence*

[12] Pursuant to Practice Book § 13-4, the plaintiffs disclosed Mark Korsten, a physician board certified in internal medicine and gastroenterology, Bagdasarian, a physician board certified in surgery, and Natalie Mohammed, a registered nurse, as expert witnesses.

was the cause of the accident." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, supra, 175 Conn. App. 718–19; see also *Sargis* v. *Donahue*, 142 Conn. App. 505, 513, 65 A.3d 20, cert. denied, 309 Conn. 914, 70 A.3d 38 (2013).

To determine whether the plaintiff has carried his or her burden with respect to causation, "an expert opinion need not walk us through the precise language of causation . . . . *To be reasonably probable, a conclusion must be more likely than not. . . . Whether an expert's testimony is expressed in terms of a reasonable probability that an event has occurred does not depend upon the semantics of the expert or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert's testimony.* . . . [S]ee, e.g., *State* v. *Weinberg*, 215 Conn. 231, 245, 575 A.2d 1003 ([a]n expert witness is competent to express an opinion, even though he or she may be unwilling to state a conclusion with absolute certainty, so long as the expert's opinion, if not stated in terms of the certain, is at least stated in terms of the probable, and not merely the possible . . .), cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 413 (1990); *Aspiazu* v. *Orgera*, 205 Conn. 623, 632–33, 535 A.2d 338 (1987) ([w]hile we do not believe that it is mandatory to use talismanic words or the particular combination of magical words represented by the phrase reasonable degree of medical certainty [or probability] . . . there is no question that, to be entitled to damages, a plaintiff must establish the necessary causal relationship between the injury and the physical or mental condition that he claims resulted from it . . .)." (Citations omitted; emphasis added; internal quotation marks omitted.) *Rosa* v. *Lawrence & Memorial Hospital*, supra, 145 Conn. App. 304; see also *Struckman* v. *Burns*, 205 Conn. 542, 554–55, 534 A.2d 888 (1987).

Guided by these principles, we set forth a detailed description of the evidence produced at trial by the plaintiffs regarding causation.[13]

Lapaan's deposition testimony was read to the jury during the trial. Her full-time employment with the defendant commenced in November, 2012. During Bruce Cockayne's hospital admission in February, 2014, Lapaan was his "primary nurse." He was the only patient to whom she had ever administered a Rowasa enema, and this occurred at approximately 8:15 p.m. on February 13, 2014. Lapaan described the Rowasa enema as having a shorter tip than other types of enemas and noted that rectal perforation was a concern. She further stated that if the tip of the Rowasa enema was manipulated excessively, it potentially could cause damage.

Kaine testified that she began her employment with the defendant in August, 2013, following her graduation from nursing school. She administered her first unsupervised enema at approximately 9:45 p.m. on February 11, 2014, to Bruce Cockayne and her second at approximately 8 p.m. the next day. Kaine explained that the proper administration of a Rowasa enema required her to position the patient on his left side and bring the knees up to the chest. She would then guide the tip of the enema into the anus and anal canal, directing it toward the belly button of the patient. Kaine agreed

[13] As is frequently the case in medical malpractice actions, the defendant's experts disagreed with the opinions of the plaintiffs' expert, including on the matters relating to causation. See, e.g., *Grondin* v. *Curi*, 262 Conn. 637, 657 n.20, 817 A.2d 61 (2003); *Gilbert* v. *Middlesex Hospital*, 58 Conn. App. 731, 737, 755 A.2d 903 (2000). We have noted that "[c]onflicting expert testimony does not necessarily equate to insufficient evidence." (Internal quotation marks omitted.) *Dallaire* v. *Hsu*, 130 Conn. App. 599, 603, 23 A.3d 729 (2011). Furthermore, "[t]he existence of conflicting evidence limits the court's authority to overturn a jury verdict. The jury is entrusted with the choice of which evidence is more credible and what effect it is to be given." (Internal quotation marks omitted.) *Barrows* v. *J.C. Penney Co.*, 58 Conn. App. 225, 230, 753 A.2d 404, cert. denied, 254 Conn. 925, 761 A.2d 751 (2000).

that misdirecting the tip of the enema, or an excessive use of force, would constitute a violation of the standard of care.[14]

The plaintiffs' attorneys read the transcript of Bagdasarian's deposition testimony to the jury. Bagdasarian opined that an internal hemorrhoid caused the massive bleeding on February 14, 2014, and that this issue was distinct from the older rectal perforation, which was located "slightly deeper or higher" and on the opposite side. He further stated that the insertion of a foreign body, such as a Rowasa enema, into the rectum caused the perforation that resulted in the sepsis suffered by Bruce Cockayne, but he could not definitively identify the specific item that caused this injury.[15] Bagdasarian then noted the perforation likely occurred prior to February 14, 2014.

On the third day of the trial, the plaintiffs presented expert testimony from Mark Korsten, a physician board certified in internal medicine and gastroenterology.[16]

[14] Our law has recognized that, under some circumstances, a defendant medical provider can provide the evidence necessary with respect to the elements of a medical malpractice claim. In *Console* v. *Nickou*, supra, 156 Conn. 273–74, the defendant physician testified that, in the exercise of reasonable standards of care and skill, a suture needle should not be left in a patient's body in the course of repairing an episiotomy and such an occurrence would constitute a violation of the standard of care. Our Supreme Court concluded that the defendant himself, a qualified expert, could provide the necessary evidence to support the verdict in favor of the plaintiff with respect to her medical malpractice claim. Id., 274; see also *Allen* v. *Giuliano*, 144 Conn. 573, 574–75, 135 A.2d 904 (1957) (defendant physician admitted during cross-examination that cast cutter, if used properly, should not have caused lacerations on plaintiff's leg).

[15] Bagdasarian had indicated in his postoperative notes that "it is presumed that [Bruce Cockayne] may have had anal rectal trauma related to a traumatic enema insertion causing the bleeding episode [two] days ago, and perforation into the extraperitoneal space."

[16] Korsten defined gastroenterology as "the diagnosis and treatment of disorders of the gastrointestinal tract that can extend from the mouth to the anus and all organs that supply additional backup to the gastrointestinal tracts, such as the pancreas and the liver."

Korsten stated that, as a part of his duties, he trained physicians in the proper administration of enemas and that this procedure or technique would apply to both physicians and nurses. He explained that if the patient has a hemorrhoid or tender skin, then a more cautious approach is warranted. Korsten noted that, if the inserted object comes into contact with the hemorrhoid, the patient may "strain" and alter the anatomy of the rectum, making the procedure "more difficult and maybe more dangerous." Korsten also testified that he located two medical articles that recognized the possibility of rectal perforation resulting from an enema.[17]

Korsten reviewed Bruce Cockayne's medical records from the defendant and Hartford Hospital, as well as various deposition testimony. He described the perforation as a "significant tear" located not very far into the rectum, just past the terminus of the anal canal. Korsten stated that the insertion of a foreign body constituted the most common cause of a rectal tear. He opined, to a reasonable degree of medical probability, that the tip of an enema caused the perforation.[18] He had seen this injury only when there had been a deviation from the standard of care in the administration of an enema.[19]

[17] The plaintiffs' expert on the nursing standard of care, Natalie Mohammed, also testified that she was aware of rectal perforations that occurred from enema administration during her career.

[18] One of the defendant's expert witnesses, Tricia Marie Ramsdell, a registered nurse, testified that, during her deposition, she had identified four possible causes for the perforation: first, the enema administrations performed by Kaine and Lapaan; second, the enema administration performed by Marion Cockayne; third, the colonoscopy performed in January, 2014; and fourth, a spontaneous tearing as a result of Crohn's disease. Joel Weinstock, the defendant's expert gastroenterologist, and Walter Longo, a colon and rectal surgeon, also identified similar concerns during their depositions. Both Weinstock and Longo opined that the likely causes for perforation were the colonoscopy or a spontaneous rupture resulting from Crohn's disease.

[19] Our Supreme Court has noted that, "in certain cases, it may be impossible to determine the precise cause of the injury even after extensive discovery. In those cases, the plaintiff's expert nevertheless may be able to opine, to a reasonable degree of medical certainty, that the injury would not have

The location of the perforation, the right posterior wall of the rectum, led Korsten to believe that the enema had been administered incorrectly. He rejected the possibility in this case that the perforation was caused by Crohn's disease.[20] Additionally, Korsten ruled out a colonoscopic injury as the cause of this perforation, as there would have been symptoms, such as intense pain, almost immediately.

Korsten agreed with the defendant's counsel that the tip of a Rowasa enema measured 1.75 inches. He further testified during cross-examination that the length of the anal canal ranges between 3 centimeters and approximately 5.3 centimeters and that there is approximately 2.5 centimeters per inch. He explained, therefore, that the length of the Rowasa enema, approximately 1.75 inches, could reach beyond the anal canal to the location of the perforation in Bruce Cockayne's rectum.[21]

During redirect examination, Korsten discussed the summary prepared when Bruce Cockayne was transferred from the defendant to Hartford Hospital. The physician who prepared that document opined that the perforation was caused by "aggressive enema" use. Korsten explained that this notation referred to excessive force employed in the administration of the enemas. He iterated that misdirection, excessive force, or some combination of the two, caused the perforation and constituted a violation of the standard of care.

occurred in the absence of medical negligence. As a general matter, there is no reason why that opinion evidence would not be sufficient to survive a motion for a directed verdict." *Wilcox* v. *Schwartz*, 303 Conn. 630, 650, 37 A.3d 133 (2012).

[20] Korsten described Crohn's disease as an inflammatory bowel disease that presented in a "spotty" nature, as opposed to ulcerative colitis, which affects all parts of the colon.

[21] Natalie Mohammed, a registered nurse, also testified that the Rowasa enema, if inserted improperly, could have reached the posterior wall of the rectum to cause the perforation suffered by Bruce Cockayne.

The plaintiffs also presented expert testimony from Natalie Mohammed, a registered nurse, who had reviewed the medical records and certain deposition testimony. She testified that, assuming that the perforation had occurred on February 11, 12 or 13, 2014, and that the perforation resulted from improper positioning and/or excessive force during the administration of a Rowasa enema, it was her opinion, to a reasonable degree of medical probability, that there was a deviation from the standard of care. In providing this testimony, she expressly relied on Korsten's testimony regarding the issue of causation.

After the plaintiffs had rested, the defendant moved for a directed verdict. Specifically, the defendant's counsel argued that the jury lacked an evidentiary basis to determine (1) whether the Rowasa enema was long enough to cause the perforation and (2) when the perforation occurred and, therefore, which nurse, Lapaan or Kaine, breached the standard of care. After hearing further argument from both parties, the court reserved its decision on the defendant's motion for a directed verdict. The jury subsequently returned a verdict in favor of the plaintiffs.

On March 2, 2020, the defendant filed a motion for judgment notwithstanding the verdict. It argued that "the only expert opinions presented at trial were that the existence of the perforation, standing alone, constituted negligence." The defendant further argued that "the plaintiffs did not provide any testimony or evidence that would have allowed the jury to determine that the Rowasa enema was long enough to reach the spot of the perforation." The plaintiffs filed their objection two weeks later.

On August 25, 2020, the court issued a memorandum of decision denying the defendant's motion for judgment notwithstanding the verdict. The court noted that

Korsten's testimony established causation by ruling out other possible causes of the injury, such as a spontaneous perforation due to Crohn's disease or perforation from the colonoscopy or from the enema administered by Marion Cockayne. The court further relied on Korsten's testimony concerning the improper administration of the enemas, that either misdirection or excessive force, or a combination thereof, caused the perforation. Finally, the court concluded that the medical records, diagrams and other demonstrative evidence provided a sufficient basis for the jury to conclude that the Rowasa enema was of a sufficient length to have caused the injury in this case. "Viewing all of the evidence presented at trial, the court does not find that the verdicts were manifestly unjust because the jury mistakenly applied a legal principle or because there was no evidence to which the legal principles of the case could be applied. Rather, the court finds that the jury could reasonably and legally have reached the conclusion that it did. Consequently, the verdicts must stand."

On appeal, the defendant iterates its contention that the plaintiffs failed to meet their burden with respect to causation. Specifically, it argues that there was insufficient evidence that (1) the Rowasa enema could cause the perforation in the posterior of the rectum and (2) either of the defendant's employees negligently administered the enema. We will address each contention in turn.

A

The defendant first contends that the plaintiffs failed to produce sufficient evidence from which the jury reasonably could conclude that the Rowasa enema could have caused the perforation in the posterior of the rectum. Specifically, it argues that there was no expert evidence presented that the Rowasa enema was of sufficient length or rigidity to have caused the perforation

sustained by this specific individual. We are not persuaded.[22]

In its brief, the defendant asserts that the evidence at trial established that the tip of the Rowasa enema was 4.375 centimeters in length and that the average length of the anal canal is between 3.5 centimeters and 5 centimeters. "Therefore, if [Bruce] Cockayne's anal canal was anywhere near the long end of average, the tip of the Rowasa enema could not have reached beyond the anal canal into the rectum, let alone to the posterior of the rectum. And even if [Bruce] Cockayne had a shorter anal canal within that range, it is almost inconceivable that the soft, flexible tip of the Rowasa enema could have rounded the bend at the end of the canal and crossed the rectum to cause a two centimeter puncture in the posterior rectal wall." (Internal quotation marks omitted.) The defendant essentially argues that the plaintiffs were required to present evidence of Bruce Cockayne's specific anatomical measurements, rather than the average range.

During his testimony, Korsten described the perforation: "Well, it's considered to be a significant tear. It's a long tear. It was not very far into the rectum. It was just in an area where the anal canal had ended and just into the most terminal part of the rectum . . . ." He also stated that the improper administration of an enema could cause such a perforation. He had physically examined this type of enema. Korsten described the tip of the Rowasa enema as "not that flexible" and having "some stiffness to it." Korsten also opined that

[22] The defendant further contends that the jury could not use the statements of Bruce Cockayne's treating physicians as a basis to find that the Rowasa enema could have perforated his rectum and that the jury could not use the location of the perforation as a basis to find causation. As a result of our conclusions regarding the sufficiency of the other evidence, we need not address these contentions.

aggressive force had been used during the administration of the enemas during the hospitalization. He stated that the length of the anal canal ranged, on average, between 3 centimeters and 5.3 centimeters and, therefore, the tip of the enema, measuring 4.375 centimeters, could reach into the rectum, the location of the perforation in this case. Additionally, he noted that, "[i]n certain circumstances, the tip may well not bend the way you would like it to bend. It may get caught, snag itself, the tip may get snagged against the lining of the intestine and as you continue to push, it is definitely possible, if not likely, that this tool is strong enough to go through the rectum." In conclusion, Korsten stated that there was "no doubt" in his mind that the Rowasa enema was capable of causing the perforation suffered by Bruce Cockayne.

The defendant has failed to cite any authority for its assertion that the plaintiffs needed to provide specific evidence of Bruce Cockayne's actual anatomical measurements. This argument imposes a requirement on expert testimony and evidence beyond that found in our jurisprudence. "Expert opinions must be based upon reasonable probabilities rather than mere speculation or conjecture if they are to be admissible in establishing causation. . . . To be reasonably probable, a conclusion must be more likely than not." (Internal quotation marks omitted.) *Peatie* v. *Wal-Mart Stores, Inc.*, 112 Conn. App. 8, 21, 961 A.2d 1016 (2009). The plaintiff is not required to disprove all other possible explanations. *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, supra, 175 Conn. App. 719. We iterate that an expert is not required to use talismanic words to show reasonable probability so long as it is clear that his or her opinion is based on reasonable probabilities, i.e., more likely than not, to establish that the opinion constitutes more than pure speculation. *Milliun* v. *New Milford Hospital*, 129 Conn. App. 81, 100, 20 A.3d 36 (2011),

aff'd, 310 Conn. 711, 80 A.3d 887 (2013); see also *State* v. *Nunes*, 260 Conn. 649, 672–73, 800 A.2d 1160 (2002); *Gois* v. *Asaro*, 150 Conn. App. 442, 449–50, 91 A.3d 513 (2014).

The jury heard different expert opinions regarding whether the Rowasa enema could have caused the perforation and was tasked with determining which opinion to believe. See *Scott* v. *CCMC Faculty Practice Plan, Inc.*, 191 Conn. App. 251, 260, 214 A.3d 393 (2019). We emphasize that "[c]onflicting expert testimony does not necessarily equate to insufficient evidence. . . . Rather, [w]here expert testimony conflicts, it becomes the function of the trier of fact to determine credibility and, in doing so, it could believe all, some or none of the testimony of [an] expert. . . . It is axiomatic that in cases involving conflicting expert testimony, the jury is free to accept or reject each expert's opinion in whole or in part." (Citations omitted; internal quotation marks omitted.) *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, supra, 175 Conn. App. 721; see also *Ayres* v. *Ayres*, 193 Conn. App. 224, 246, 219 A.3d 894, cert. denied, 334 Conn. 903, 219 A.3d 800 (2019), and cert. denied, 334 Conn. 903, 219 A.3d 800 (2019); *Arroyo* v. *University of Connecticut Health Center*, 175 Conn. App. 493, 518, 167 A.3d 1112, cert. denied, 327 Conn. 973, 174 A.3d 192 (2017); see generally *Nash* v. *Hunt*, 166 Conn. 418, 426, 352 A.2d 773 (1974) (jurors not obliged to accept ultimate opinion of expert witness and if such witness is not found credible, jurors will reject his or her opinion regardless of whether they believe or disbelieve subordinate facts on which expert opinion is based; further, jurors must reject expert opinion to extent it is based upon subordinate facts which they determine are not proved). For these reasons, we conclude that the plaintiffs met their burden of producing sufficient evidence that the Rowasa enema was physically capable of causing the perforation in the present case, and, therefore,

the defendant's arguments to the contrary must fail. See *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, supra, 318 Conn. 863 (trial court may grant motion for judgment notwithstanding verdict only if jury could not reasonably and legally reach any other conclusion and "must deny such a motion 'where it is apparent that there was some evidence upon which the jury might reasonably reach [its] conclusion' ").

B

The defendant next argues that the plaintiffs failed to produce sufficient evidence from which the jury reasonably could conclude that either of its employees, Kaine or Lapaan, negligently administered the enema.[23] Specifically, it contends that the plaintiffs failed to present any affirmative evidence that either nurse negligently caused the perforation and that the use of a differential diagnosis is an improper method of establishing causation. We disagree.

The defendant's argument relies significantly on our decision in *Mozzer* v. *Bush*, supra, 11 Conn. App. 434. In that case, the plaintiff sustained a right ulnar neuropathy during a gall bladder operation. Id., 435. The plaintiff claimed that the surgeon and anesthesiologist negligently positioned her right arm during the surgery. Id. The plaintiff testified "that she had no knowledge of what had transpired in the operating room, and did not

[23] As we noted in *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, supra, 175 Conn. App. 692, "[a] party challenging the validity of the jury's verdict on grounds that there was insufficient evidence to support such a result carries a difficult burden. In reviewing the soundness of a jury's verdict, we construe the evidence in the light most favorable to sustaining the verdict. . . . Furthermore, it is not the function of this court to sit as the seventh juror when we review the sufficiency of the evidence . . . rather, we must determine . . . whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . . [I]f the jury could reasonably have reached its conclusion, the verdict must stand . . . ." (Internal quotation marks omitted.) Id., 716.

remember being positioned on the operating table." Id. During the trial, the plaintiff's first expert witness, a neurosurgeon, opined that her injury "was 'related in some way to her surgical procedure.' " Id. The plaintiff's second expert witness, an anesthesiologist, testified, in response to a hypothetical question, that, in his opinion, the injury had occurred during the surgery. Id., 435–36.

After the plaintiff rested, the trial court struck the testimony of the plaintiff's experts and granted the defendants' motions for directed verdicts. Id., 436. Specifically, the court determined "that the testimony of such expert witnesses was purely speculative . . . and [that] such testimony could not be used reasonably to support a verdict for the plaintiff . . . ." (Internal quotation marks omitted.) Id.

On appeal, the plaintiff claimed that the court erred in striking her experts' testimony after she had concluded her case. Id. We determined that this claim had not been raised before the trial court and was not plain error. Id., 437–38. Accordingly, we declined to address the merits of her claim regarding the timing of the trial court's decision to strike the expert testimony. Id., 438.

This court expressly has noted the limited applicability of *Mozzer*. For example, in *Samose* v. *Hammer-Passero Norwalk Chiropractic Group, P.C.*, 24 Conn. App. 99, 100, 586 A.2d 614, cert. denied, 218 Conn. 903, 588 A.2d 1079 (1991), the plaintiffs commenced a malpractice action against a business entity and two of its agents who were chiropractors. The jury returned a verdict in favor of the plaintiff with respect to one of the chiropractors and the business entity. Id., 101. On appeal, the defendants claimed that the trial court improperly failed to direct a verdict in their favor on the basis that the plaintiff presented insufficient evidence to prevail. Id., 102. In rejecting this claim and affirming the judgment, we noted that there was evidence for the

jury to find that the failure to take X-rays, coupled with a subsequent spinal manipulation of the seventy-six year old plaintiff, constituted a deviation from the applicable standard of care. Id., 103. The jury also heard evidence of causation from numerous witnesses regarding the degree of force and the type of spinal manipulation done on successive days to the plaintiff's back. Id., 104. One of the experts specifically identified which chiropractor ruptured the plaintiff's disc. Id.

In rejecting the defendant's reliance on *Mozzer* v. *Bush*, supra, 11 Conn. App. 434, we noted that the plaintiff in that case had presented no evidence as to what had occurred during her surgery and completely failed to identify any specific act of negligence by a particular person. *Samose* v. *Hammer-Passero Norwalk Chiropractic Group, P.C.*, supra, 24 Conn. App. 105–106. "[I]n contrast [to *Mozzer*], the plaintiff met his burden of presenting evidence as to what took place at the chiropractors' offices and who acted on him on the dates in question. *Mozzer* is thus distinguishable from [*Samose*] and does not control its outcome." Id., 106; see also *Amsden* v. *Fischer*, 62 Conn. App. 323, 331–32, 771 A.2d 233 (2001) (*Mozzer* was distinguishable and court properly denied motions for directed verdict and to set aside jury's verdict when plaintiff met his burden of proving what transpired during surgery and follow-up visits).

In the present case, the jury heard evidence that there was no perforation of Bruce Cockayne's rectum in January, 2014, that the most likely cause of the rectal perforation was the insertion of a foreign object, and that nothing had been inserted into Bruce Cockayne's anus or rectum following the attempted enema administration by Marion Cockayne until his February, 2014 hospitalization and the administration of enemas by the

defendant's employees. The jury also heard expert testimony as to four possible causational events: (1) a colonoscopy, (2) Marion Cockayne's attempted administration of a Rowasa enema at the plaintiffs' home, (3) the nurses' administration of Rowasa enemas during Bruce Cockayne's February, 2014 hospitalization, and (4) a spontaneous tearing of the rectum as a result of Crohn's disease.

Korsten used a differential diagnosis to eliminate the colonoscopy, the attempted administration of the Rowasa enema at the plaintiffs' home, and the spontaneous tearing of the rectum as a result of Crohn's disease as the cause of the perforation. He opined that, to a reasonable degree of medical probability, a Rowasa enema administered during the February, 2014 hospitalization of Bruce Cockyne caused the perforation. Our Supreme Court has defined a differential diagnosis as "a method of diagnosis that involves a determination of which of a variety of possible conditions is the probable cause of an individual's symptoms, often by a process of elimination. See, e.g., Stedman's Medical Dictionary (28th Ed. 2006) p. 531." *DiLieto* v. *County Obstetrics & Gynecology Group*, *P.C.*, 297 Conn. 105, 114 n.13, 998 A.2d 730 (2010). It is clear, therefore, that the defendant's attempt to establish the type of evidentiary lacunae present in *Mozzer* v. *Bush*, supra, 11 Conn. App. 436, is unavailing. See, e.g., *Procaccini* v. *Lawrence + Memorial Hospital*, *Inc.*, supra, 175 Conn. App. 725–27 (causation in medical malpractice action may be proved by circumstantial evidence and expert testimony).

The defendant also argues that a differential diagnosis is not a valid means to establish causation. We disagree. A review of our case law reveals numerous examples that support the use of a differential diagnosis. For example, in *Sargis* v. *Donahue*, supra, 142 Conn. App. 513, this court indicated that a causal relationship between an injury and its later physical effects may be

established by, inter alia, a physician's deduction by the process of eliminating other causes.

Decisions from our Supreme Court provide further guidance and support for the use of a differential diagnosis in establishing causation in a medical malpractice action. In *Milliun* v. *New Milford Hospital*, 310 Conn. 711, 714–16, 80 A.3d 887 (2013), the plaintiff, the conservator of an individual (the patient) who suffered from a rare neurological disease, filed an action against the defendant hospital for medical malpractice. Specifically, the plaintiff claimed that, while in the defendant's care, the patient experienced a calamitous, four minute respiratory event during which her rate of breathing fell to a rate of only two breaths per minute. Id., 715. Following this anoxic incident, the patient sustained severe injury to her cognitive functioning. Id., 715–16. The plaintiff alleged negligence on the part of the defendant for failing to monitor the patient, failing to respond to her respiratory distress, and administering medication known to cause respiratory distress when combined with another medication that the patient was taking. Id., 716.

The patient was evaluated and treated at the Mayo Clinic in Rochester, Minnesota. Id. Two of the physicians at the Mayo Clinic opined that the patient's cognitive impairment was caused by the anoxic incident and not her underlying neurological disorder. Id., 717. These physicians were among those disclosed as experts by the plaintiff, but the internal policies of the Mayo Clinic prevented the defendant from deposing these witnesses. Id., 718. The defendant requested that the court preclude the plaintiff from relying on the medical records of the treating physicians as to the issue of causation; the plaintiff countered that the medical records of the treating physicians were sufficient to establish this element of her case. Id., 719. Ultimately, the trial court agreed with the defendant and granted

its motion for summary judgment on the basis that the plaintiff had failed to establish the element of causation by expert testimony. Id., 722.

On appeal, our Supreme Court commenced its analysis by stating that causation may be established by a signed report of a treating physician in place of live testimony, so long as the defendant was afforded the opportunity to cross-examine the author of such a report. Id., 725–26. It then explained that an expert's opinion may be based on hearsay. Id., 727.[24]

After a careful review of the medical records, in which the Mayo Clinic physicians had considered the patient's medical history and had conducted their own testing and examinations, our Supreme Court concluded that these physicians had sufficient, reliable information to diagnose the patient and to determine the cause of her cognitive impairment. Id., 731–32. "The physicians ruled out [the patient's neurological condition] or some other neurodegenerative condition as the cause of those injuries and apparently concluded that the anoxic incident, as described, was the presumptive cause of [the patient's] cognitive deficits because such a causal relationship was consistent with the timing of the onset of symptoms, the symptoms manifested and the results of comprehensive examination and testing. *Such a deductive process is a proper method on which to base an opinion as to causation. . . . Although*

[24] Specifically, our Supreme Court stated: "Therefore, an expert's opinion is not rendered inadmissible merely because the opinion is based on inadmissible hearsay, so long as the opinion is based on trustworthy information and the expert had sufficient experience to evaluate that information so as to come to a conclusion which the trial court might well hold worthy of consideration by the jury. . . . The fact that a physician's report includes hearsay statements, whether from a patient or someone else, would not bar the report's admission on that basis unless those statements were being offered for substantive purposes, i.e., the truth of the matter asserted." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Milliun* v. *New Milford Hospital*, supra, 310 Conn. 727–28.

there may be other possible causes that the physicians did not consider, such matters go to weight, not admissibility." (Citations omitted; emphasis altered.) Id., 732–33; see also *Mancuso* v. *Consolidated Edison Co. of New York, Inc.*, 967 F. Supp. 1437, 1446 (S.D.N.Y. 1997) (critical to establishing specific causation is exclusion of other possible causes of symptoms, and this method of considering all relevant potential causes and eliminating alternative causes based upon physical examination, clinical tests and thorough case history is called differential diagnosis).

In *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 243–44, 9 A.3d 364 (2010), the plaintiff was receiving intravenous antibiotics following an operation. A registered nurse employed by the defendant inserted a new intravenous line into his left arm, and, following this procedure, he experienced neurological deficits in his left hand. Id., 244–45. The plaintiff alleged that the defendant's employee committed medical malpractice by improperly inserting the intravenous line and causing an anterior interosseous nerve palsy. Id., 245.

The defendant disclosed an expert to testify that the plaintiff's condition was the result of Parsonage Turner Syndrome. Id. During the trial, the plaintiff's expert, who had not been disclosed as an expert on Parsonage Turner Syndrome, was asked about it on direct examination. Id., 245–46. The court sustained the defendant's objection but allowed the plaintiff's expert to testify outside of the presence of the jury regarding his knowledge of this condition. Id., 246. The jury returned a verdict for the defendant, which the court accepted. Id., 247–48.

On appeal, the plaintiff claimed that the court improperly excluded his expert from testifying in front of the jury regarding Parsonage Turner Syndrome. Id., 249. Our Supreme Court, agreeing with the plaintiff, first

observed that the disclosure of the plaintiff's expert indicated that he would testify on the issue of causation. Id., 251–52. This disclosure implicitly informed the defendant that the expert's testimony would include what did not cause the plaintiff's injury. Id., 252. Our Supreme Court discussed the expert's use of a differential diagnosis. Id. "In the present case, [the plaintiff's expert] was permitted to testify that, in his expert opinion, the plaintiff's alleged injury can only happen as a result of negligence as a result of deviating from the standard of care. To the extent that this conclusion was the result of [the plaintiff's expert's] differential diagnosis, it necessarily was based on his consideration and elimination of the other possible causes for the alleged injury, including the theory of causation advanced by the defendant. This court never has articulated a requirement that a disclosure include an exhaustive list of each specific topic or condition to which an expert might testify as the basis for his diagnosis; disclosing a categorical topic such as causation generally is sufficient to indicate that testimony may encompass those issues, both considered and eliminated, necessary to explain conclusions within that category." (Internal quotation marks omitted.) Id.

Our Supreme Court then considered whether the trial court's improper exclusion of the plaintiff's expert witness was harmful. Id., 254–56. It noted that the plaintiff's case presented, on the issue of causation, a choice between the plaintiff's theory of an errant intravenous needle stick and the defendant's theory of Parsonage Turner Syndrome. Id., 256–57. It also reasoned that the plaintiff's expert was the only physician who testified that the defendant, through its employee, had breached the standard of care. Id., 258. "Because that conclusion rested on a differential diagnosis of the plaintiff's alleged injury, that diagnosis and its component exclusions of other possible causes were uniquely important

to the issue of breach, and accordingly, were not replicated by any other evidence at trial. The other expert testimony excluding Parsonage Turner Syndrome addressed only causation, and did not address the question of breach. . . . Additionally, it is significant, in our view, to consider that [the] excluded testimony [of the plaintiff's expert] also would have aided in establishing his credibility as an expert and the reliability of his ultimate conclusions in the eyes of the jury. In other words, but for the trial court's improper exclusion, [the plaintiff's expert] could have explained not only that he had rejected the defense theory of Parsonage Turner Syndrome as a cause, but also why he had done so." (Citation omitted; footnote omitted.) Id., 258.

On the basis of these cases, we conclude that the use of a differential diagnosis in the present case was proper and sufficient to establish the plaintiffs' theory of causation; that is, that the defendant's employees caused the perforation suffered by Bruce Cockayne during his February, 2014 hospitalization.[25]

[25] The defendant devoted a portion of its appellate brief and oral argument to the doctrine of res ipsa loquitur. It posited that the trial court "essentially relied" on this doctrine in determining that the plaintiffs had met their burden of proving negligent conduct by the nurses. The defendant argued: "The trial court's reasoning, like Dr. Korsten's opinion, appears to be based on a res ipsa loquitur theory: the very fact that there was a perforation suggests that 'something was done improperly.' " The defendant further contends that the use of this doctrine was improper as a result of the plaintiffs' failure to plead this theory of negligence specifically.

"The doctrine of res ipsa loquitur, literally the thing speaks for itself, permits a jury to infer negligence when no direct evidence of negligence has been introduced. . . . The doctrine of res ipsa loquitur applies only when two prerequisites are satisfied. First, the situation, condition or apparatus causing the injury must be such that in the ordinary course of events no injury would have occurred unless someone had been negligent. Second, at the time of the injury, both inspection and operation must have been in the control of the party charged with neglect. . . . When both of these prerequisites are satisfied, a fact finder properly may conclude that it is more likely than not that the injury in question was caused by the defendant's negligence." (Internal quotation marks omitted.) *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 575–76, 864 A.2d 1 (2005).

We agree with the defendant that res ipsa loquitur must be pleaded specifically if a plaintiff intends to use that theory of negligence. See, e.g., *White*

II

The defendant next claims that the court improperly denied its motion to set aside the verdict and order a new trial. Specifically, it argues that the plaintiffs failed to present expert evidence that Lapaan negligently caused the perforation and, therefore, the jury improperly was permitted to consider a specification of negligence unsupported by the evidence. We are not persuaded by this claim.

On January 21, 2020, the defendant filed proposed jury interrogatories consisting of four questions. Questions one and two asked the jury to indicate whether the plaintiffs had proved that Kaine deviated from the standard of care in her treatment of Bruce Cockayne in 2014, and whether this deviation had caused the perforation.[26] Questions three and four repeated these inquiries with respect to Lapaan.[27] The plaintiffs

v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 626–27, 99 A.3d 1079 (2014). We disagree, however, with the defendant that this doctrine was relied on by the plaintiffs or the trial court. As we have explained, the plaintiffs presented testimony from expert witnesses to establish causation, which included the use of a differential diagnosis. There was expert testimony presented to the jury ruling out certain events as having caused the perforation and identifying the specific act that did cause it. The negligence, in this case, was not inferred in the absence of direct evidence. Accordingly, we conclude that the defendant's contention that the plaintiffs could prevail only by relying on res ipsa loquitur, which was not part of this case, is unavailing.

[26] Questions one and two of the defendant's proposed jury interrogatories provided: "[1] Did the plaintiffs . . . prove by a fair preponderance of the evidence that Jordan Kaine, RN (an employee of [the defendant]) deviated from the prevailing standard of care for registered nurses in 2014 in her care and treatment of Bruce Cockayne? . . . If the answer to Question 1 is 'no,' then skip Question 2 and continue to Question 3. . . . [2] Did the plaintiffs . . . prove by a fair preponderance of the evidence that Jordan Kaine's deviation from the prevailing standard of care caused the rectal perforation? . . . If the answer to Question 2 is 'no,' continue to Question 3. If the answers to Questions 1 and 2 are 'yes,' complete the plaintiff's verdict form."

[27] Questions three and four of the defendant's proposed jury interrogatories provided: "[3] Did the plaintiffs . . . prove by a fair preponderance of the evidence that Elaine Lapaan, RN (an employee of [the defendant]) devi-

objected to the defendant's proposed jury interrogatories on January 23, 2020.

On January 23, 2020, the plaintiffs and the defendant expressly indicated their satisfaction with the court's proposed jury charge.[28] The court then heard argument regarding the defendant's proposed jury interrogatories.[29] The defendant's counsel argued, inter alia, that the jury was required to find that at least one of its employees, Kaine or Lapaan, was negligent.[30] The court, in the exercise of its discretion,[31] denied the defendant's

ated from the prevailing standard of care for registered nurses in 2014 in her care and treatment of Bruce Cockayne? . . . If the answers to Questions 1 and 3 are 'no,' then enter a verdict in favor of the defendant . . . on the defendant's verdict form and skip Question 4. If the answer to Question 3 is 'yes,' continue to Question 4. . . . [4] Did the plaintiffs . . . prove by a fair preponderance of the evidence that Elaine Lapaan's deviation from the prevailing standard of care caused the rectal perforation? . . . If the answer to Question 4 is 'no,' then enter a verdict in favor the defendant . . . on the defendant's verdict form. If the answer to Question [4] is 'yes,' complete the plaintiff's verdict form."

[28] "In the absence of a challenge to the trial court's charge to the jury . . . that charge becomes the law of the case. . . . The sufficiency of the evidence must be assessed in light of that law of the case." (Citation omitted.) *Gagliano* v. *Advanced Specialty Care, P.C.*, 329 Conn. 745, 755, 189 A.3d 587 (2018).

[29] The plaintiffs' counsel also submitted proposed interrogatories but subsequently noted his agreement with the court's intention to not provide any interrogatories to the jury.

[30] Specifically, the defendant's counsel stated: "And so the interrogatories make it clear to the jury, you have to decide whether it's been proven by a preponderance of the evidence that Nurse Lapaan was negligent, and then separately answer whether the plaintiff has established by a preponderance of the evidence whether Nurse Kaine was negligent. And if that isn't provided to the jury, the danger is that they'll—they'll accept this theory from the plaintiffs' experts that it doesn't really matter if you don't know which one of them was negligent."

[31] "The trial court has broad discretion to regulate the manner in which interrogatories are presented to the jury, as well as their form and content." (Internal quotation marks omitted.) *Viera* v. *Cohen*, 283 Conn. 412, 450, 927 A.2d 843 (2007); see also Practice Book § 16-18 (judicial authority may submit written interrogatories to jury); *Earlington* v. *Anastasi*, 293 Conn. 194, 200, 976 A.2d 689 (2009) (it is within reasonable discretion of presiding judge to require or to refuse to require jury to answer pertinent interrogatories, as proper administration of justice may require).

motion to submit interrogatories to the jury. It concluded that the proposed interrogatories were inconsistent with the agreed upon jury charge that used "and/or" language with respect to the culpability of Kaine and Lapaan and were unnecessary, given the separate nature of the two counts alleged in the plaintiffs' complaint.[32]

Subsequent to the jury's verdict, on March 2, 2020, the defendant filed a motion to set aside the verdict rendered in favor of the plaintiffs.[33] In the attached memorandum of law, the defendant argued: "It is . . . impossible to know whether the jury concluded that Kaine negligently caused the perforation or whether it concluded that Lapaan negligently caused the perforation. The only causation expert opinion presented to the jury was from . . . Korsten, who testified that Kaine, not Lapaan, negligently caused the perforation. Thus, the jury could not have reasonably concluded that Lapaan negligently caused the rectal perforation."

[32] The following examples from the jury instructions provide the relevant context for the court's ruling on the defendant's motion to submit interrogatories. "In this case, the plaintiffs claim that Bruce Cockayne *was injured through the negligence of Nurses Jordan Kaine and/or Elaine Lapaan*, both of whom were employees of [the defendant]. . . . In order to establish liability, the plaintiffs must prove by a fair preponderance of the evidence that the *conduct of Jordan Kaine and/or Elaine Lapaan represented a breach of the prevailing professional standard of care* that I have just described.

* * *

"In their complaint, the plaintiffs allege that [the defendant's] employees, *Nurses Kaine and/or Lapaan, breached the standard of care* applicable to registered nurses, and were, therefore, negligent in the care and treatment rendered to Bruce Cockayne and that either one or both of them perforated Bruce Cockayne's rectum during the course of an enema treatment. . . . The plaintiffs must prove that any injury or harm for which they seek compensation from [the defendant] *was caused by Nurses Kaine and/or Lapaan*." (Emphasis added.)

[33] See General Statutes § 52-228b ("[n]o verdict in any civil action involving a claim for money damages may be set aside except on written motion by a party to the action, stating the reasons relied upon in its support, filed and heard after notice to the adverse party according to the rules of the court").

The defendant further contended that the general verdict rule[34] did not apply in this case, and the court could not presume that the jury had found that Kaine caused Bruce Cockayne's injury. It concluded: "The jury may have improperly concluded that Lapaan was negligent and that her negligence was the sole proximate cause of the perforation."

On March 16, 2020, the plaintiffs filed their objection to the defendant's motion to set aside the verdict. In its March 30, 2020 reply, the defendant emphasized that, "[e]ven if there was a sufficient basis to conclude that

[34] "The general verdict rule operates to prevent an appellate court from disturbing a verdict that may have been reached under a cloud of error, but is nonetheless valid because the jury may have taken an untainted route in reaching its verdict. . . . Under the general verdict rule, if a jury [returns] a general verdict for one party, and [the party raising a claim of error on appeal did not request] interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party. . . . Thus, in a case in which the general verdict rule operates, if any ground for the verdict is proper, the verdict must stand; only if every ground is improper does the verdict fall. . . . A party desiring to avoid the effects of the general verdict rule may elicit the specific grounds for the verdict by submitting interrogatories to the jury. Alternatively, if the action is in separate counts, a party may seek separate verdicts on each of the counts. . . .

"Our Supreme Court has held that the general verdict rule applies to the following five situations: (1) denial of separate counts of a complaint; (2) denial of separate defenses pleaded as such; (3) denial of separate legal theories of recovery or defense pleaded in one count or defense, as the case may be; (4) denial of a complaint and pleading of a special defense; and (5) denial of a specific defense, raised under a general denial, that had been asserted as the case was tried but that should have been specially pleaded." (Citations omitted; internal quotation marks omitted.) *Green* v. *H.N.S. Management Co.*, 91 Conn. App. 751, 754–55, 881 A.2d 1072 (2005), cert. denied, 277 Conn. 909, 894 A.2d 990 (2006). Additionally, the general verdict rule had been held to be inapplicable when the complaint contains several specifications of negligence of an interlocking nature that support only one theory of recovery and it would be too difficult to consider them separately. Id., 755–57; see also *Rodriguez* v. *State*, 155 Conn. App. 462, 486 n.16, 110 A.3d 467 (decisions of our Supreme Court repeatedly have held that "general verdict rule does not apply to different specifications of negligence"), cert. granted, 316 Conn. 916, 113 A.3d 71 (2015) (appeal withdrawn December 15, 2015).

Kaine negligently caused the perforation, it is well established that, when the general verdict rule is inapplicable, a new trial is required if [the court concludes that] . . . any ground on which the jury could have based its verdict was improper." (Emphasis omitted; internal quotation marks omitted.) The court heard argument from the parties on July 20, 2020.

The court issued its memorandum of decision denying the defendant's motion to set aside the verdict on August 25, 2020. It noted its agreement with the plaintiffs' position that "it did not matter which nurse caused Bruce Cockayne's injuries because vicarious liability would [have] attach[ed] in either case." The court also explained that the plaintiffs' complaint consisted of a primary cause of action, medical malpractice, and a secondary, derivative cause of action, loss of consortium. "Notwithstanding the [defendant's] valiant attempts to cast the plaintiffs' claims as separate counts of negligence directed against the individual nurses, the plaintiffs did not allege separate and distinct causes of action against Nurse Kaine and Nurse Lapaan. Consequently, the plaintiffs' burden was to prove that either one or both of the nurses negligently perforated Bruce Cockayne's rectum during the course of an enema treatment causing him injury."[35]

[35] In further support of its reasoning, the trial court expressly stated that the plaintiffs' theory of the case was that either one, or both, of the nurses improperly administered the enema. "The plaintiffs' position throughout the trial was that since this action was only brought against the nurses' employer, and it was stipulated that both nurses were acting within the scope of their employment, *it did not matter which nurse caused Bruce Cockayne's injuries because vicarious liability would attach in either case*." (Emphasis added.)

We note that the defendant's proposed interrogatories would have required the members of the jury to agree unanimously on which nurse, Kaine or Lapaan, had violated the standard of care and caused Bruce Cockayne's injuries. Such a requirement would have elevated the plaintiffs' burden to a standard not required by our jurisprudence.

To be sure, "[i]n this state it is required that jury verdicts be unanimous, requiring each juror to decide the case individually after impartial consideration of the evidence with the other jurors." (Internal quotation marks

The court concluded that the plaintiffs had presented sufficient evidence at trial to meet their burden to prevail on their claims. Specifically, it pointed to the following in its summary of the evidence: "Korsten testified that he did not know which of the two nurses caused the perforation, however, when pressed by [the defendant's] counsel he stated that, more likely than not, Nurse Kaine administered the enema that caused the perforation. Nurse Mohammed also testified that she could not determine which of the two nurses caused the perforation, but that the enema administered by Nurse Lapaan was the likely cause. . . . There was no dispute that both nurses had administered a Rowasa enema to Bruce Cockayne . . . ."

The defendant's claim here requires us to conduct a bifurcated inquiry. First, we must determine whether the plaintiffs presented sufficient evidence to support a finding that Lapaan negligently caused the perforation. If we answer that question in the negative, then we proceed to a determination of whether the jury's verdict may stand.[36] If we conclude, however, that the plaintiffs presented sufficient evidence with respect to either nurse having caused the perforation, then this claim must fail.

omitted.) *Monti* v. *Wenkert*, 287 Conn. 101, 114, 947 A.2d 261 (2008); see also Practice Book § 16-30. This unanimity requirement, as the trial court implicitly recognized, did not extend to a finding of which nurse bore the ultimate responsibility for the perforation. In other words, the jurors were not required to unanimously agree that it was either Kaine, Lapaan, or both, who had caused the perforation. The members of the jury simply needed to be in agreement that at least one of the nurses violated the standard of care and caused the injuries to Bruce Cockayne to find the defendant vicariously liable.

[36] We are mindful that "[t]he trial court should not submit an issue to the jury that is unsupported by the facts in evidence." (Internal quotation marks omitted.) *Gombos* v. *Aranoff*, 53 Conn. App. 347, 355, 730 A.2d 98 (1999); see also *Wager* v. *Moore*, 193 Conn. App. 608, 624, 220 A.3d 48 (2019). In light of this authority, if the pathway to a plaintiff's verdict was not supported by any evidence, a defendant would have a stronger appellate claim.

In addressing the initial question regarding the sufficiency of the causation evidence, we emphasize that a court should not set aside a verdict if it is apparent that some evidence exists on which the jury might have reached its conclusion. *Rodriguez* v. *State*, 155 Conn. App. 462, 488, 110 A.3d 467, cert. granted, 316 Conn. 916, 113 A.3d 71 (2015) (appeal withdrawn December 15, 2015); see also *Gagliano* v. *Advanced Specialty Care, P.C.*, 329 Conn. 745, 754, 189 A.3d 587 (2018); *Macchietto* v. *Keggi*, supra, 103 Conn. App. 773. As we explained in part I of this opinion, our review of this claim is plenary. See also *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 763, 212 A.3d 646 (2019) (where trial court's decision on motion to set aside verdict is premised on question of law, appellate review is plenary).

A detailed discussion of the causation evidence adduced during the trial regarding each of the defendant's nurses is necessary. Korsten testified that he was familiar with the administration of enemas as part of his medical practice. He also taught the proper administration of enemas to other medical professionals. After reviewing the relevant medical records, he reached the opinion that the perforation sustained by Bruce Cockayne was caused by an enema that had been administered improperly. During his cross-examination, Korsten indicated that either Kaine or Lapaan used excessive force, without realizing it, when administering the enema to Bruce Cockayne during his hospitalization. When asked which nurse "did not violate their nursing standard of care," he responded: "I can't tell you. I don't know." The defendant's counsel then inquired as to which nurse caused the perforation and, thus, violated the standard of care. Korsten responded: "It would be the nurse who said this was the first unsupervised administration of an enema that she had ever done. That would be the most likely person." Korsten then

stated that Kaine, who administered enemas on February 11 and 12, 2014, was more likely than not to have violated the standard of care based on her inexperience. Although Korsten identified Kaine as being the person most likely to have caused the perforation, he could not state on which date it had occurred. When asked if he thought that Lapaan was not negligent and did not cause the perforation, Korsten responded: "Just—I previously said that, I believe, that I thought it was Kaine, not Lapaan."

During redirect examination, the following colloquy occurred between the plaintiffs' counsel and Korsten:

"Q. And [the defendant's counsel] asked you to identify which nurse you think was the most probable person to do it. That was the first time that question was ever asked of you, I assume.

"A. Yes.

"Q. Your opinion has been that one or both of them did it or maybe both of them did it themselves, but you feel now after reviewing that probably the most probable person is Jordan Kaine.

"A. Yes.

"Q. You're not excluding Ms. Lapaan, but it's most likely Jordan Kaine.

"A. If I had to choose, it was Jordan Kaine.

"Q. Regardless, it was one of the [defendant's] employees . . . .

"A. Yes."

During recross-examination, Korsten again stated that Kaine was more likely than Lapaan to have caused

the perforation. Korsten, however, noted that it was not impossible for Lapaan to have caused the perforation.

Mohammed testified that she instructed other nurses on the proper administration of enemas. During cross-examination, she stated that she could not determine which nurse, Kaine or Lapaan, had administered the enema negligently and which had not. During further cross-examination, and in consideration of her deposition statements, Mohammed indicated that the February 13, 2014 enema, which was administered by Lapaan, caused the perforation. She later opined that Kaine's administrations of enemas on February 11 and 12, 2014, "contributed" to the perforation. At this point, the plaintiffs' counsel objected on the basis that Mohammed had not been disclosed as a causation expert. The court overruled this objection. Mohammed then explained that she could not state that Lapaan bore the sole responsibility for causing the perforation, rather the cumulative effect of three enemas on consecutive days caused the perforation to occur on February 13, 2014.

We conclude that the plaintiffs presented sufficient evidence for the jury to find that Lapaan caused the perforation. Korsten testified that the administration of an enema with excessive force caused the perforation. The plaintiffs presented evidence that Lapaan, in the course of her employment duties and care of Bruce Cockayne, administered an enema on February 13, 2014, during the time frame in which the perforation likely occurred. Korsten initially testified regarding his uncertainty as to which nurse, Kaine or Lapaan, caused the perforation. On specific cross-examination, however, he stated that Kaine was more likely to have caused the perforation. He later clarified, however, that he had not previously considered which nurse was more likely responsible and that, regardless, one of the nurses had caused the perforation. Viewing the totality of his

testimony, we conclude that the jury could have determined that, in Korsten's view, Kaine was more likely to have caused the perforation, but he did not exclude Lapaan. Moreover, the jury was not required to accept any specific portion of Korsten's testimony. *Shelnitz* v. *Greenberg*, 200 Conn. 58, 68, 509 A.2d 1023 (1986) (jury was free to accept or reject expert opinion in whole or in part); *Marchell* v. *Whelchel*, 66 Conn. App. 574, 583, 785 A.2d 253 (2001) (same); see also *Fajardo* v. *Boston Scientific Corp.*, Conn. , , A.3d (2021) (*Ecker*, *J.*, concurring in part and dissenting in part). The jury, therefore, could have credited his testimony that the administration of an enema by Lapaan caused the perforation in this case and that such perforation was the result of negligence.

Mohammed's testimony also provided a sufficient basis for the jury to find that Lapaan caused the perforation. First, we note that, although the plaintiffs had disclosed her as an expert on the applicable standard of care for nursing, she testified at trial, in response to questions from the defendant's counsel, on the issue of causation. The defendant's counsel, during cross-examination, referred to Mohammed's deposition where she had opined that Kaine or Lapaan used an improper technique. The defendant's counsel then questioned Mohammed as to which nurse had been negligent and specifically inquired as to which administration of an enema had caused the perforation. Next, the defendant's counsel, again referring to her deposition, asked Mohammed about her opinion that the February 13, 2014 enema administration, performed by Lapaan, caused the perforation. Mohammed testified that she still held that opinion. After further questioning by the defendant's counsel, Mohammed "clarif[ied]" her testimony and stated that she could not determine which individual nurse "solely" caused the perforation.

As we previously stated, the jury was free to credit or reject any specific part of an expert's testimony. *Procaccini* v. *Lawrence + Memorial Hospital, Inc.*, supra, 175 Conn. App. 721; see also *Shelnitz* v. *Greenberg*, supra, 200 Conn. 68. Specifically, it could have credited Mohammed's opinion, as set forth in her deposition and in court, that Lapaan caused the perforation.

In its appellate brief, the defendant notes that the plaintiffs did not disclose Mohammed as a causation expert.[37] It was, however, the defendant that raised the subject of causation with her during cross-examination. Having initiated the topic with Mohammed during the trial, the defendant cannot now change course and claim that such testimony was improper. "Our rules of procedure do not allow a [party] to pursue one course of action at trial and later, on appeal, argue that a path he rejected should now be open to him. . . . To rule otherwise would permit trial by ambuscade." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 236–37, 116 A.3d 297 (2015); see also *Szymonik* v. *Szymonik*, 167 Conn. App. 641, 650, 144 A.3d 457 (party cannot adopt one position at trial and then different one on appeal), cert. denied, 323 Conn. 931, 150 A.3d 232 (2016).

On the basis of our review of all testimony on the issue of causation, we conclude that the plaintiffs presented sufficient expert evidence for the jury to find that Lapaan caused the perforation of Bruce Cockayne's rectum. In considering the testimony from the plaintiffs' experts, the jury reasonably could have determined that

[37] In their disclosure of Mohammed as an expert witness made pursuant to Practice Book § 13-4, the plaintiffs indicated that she would "testify as to her review and analysis of the medical records of Bruce Cockayne, the depositions of the parties and witnesses and her opinions whether the [defendant] deviated from the standard of care and the results of said deviations."

there was a reasonable probability that Lapaan's conduct was a substantial factor in causing the perforation. On the basis of this evidence, the court properly denied the motion to set aside the verdict, and the defendant's claim that the jury improperly was permitted to consider a theory of negligence unsupported by the evidence must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

RODNEY CHASE *v.* COMMISSIONER OF CORRECTION (AC 44048)

Moll, Suarez and Lavine, Js.

Syllabus

The petitioner, who had previously been convicted of sexual assault in the first degree and risk of injury to a child, sought a writ of habeas corpus claiming, inter alia, that his trial counsel had provided ineffective assistance. Following a trial, the habeas court rendered judgment denying the petition, concluding that trial counsel's performance was not deficient. Thereafter, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court correctly concluded that the petitioner failed to prove that his trial counsel's performance was deficient: the habeas court reasonably concluded that the petitioner did not overcome the presumption that his trial counsel had familiarized himself with topics germane to child sexual assault cases, as the petitioner failed to present credible evidence that his counsel had failed to achieve a reasonable degree of familiarity with various materials relevant to child forensic interview protocol, disclosure literature and validation criteria; moreover, this court could not second-guess on appeal the court's credibility determinations regarding trial counsel's testimony that he had retained an expert, S, to assist with the defense, and the petitioner did not overcome the presumption that trial counsel's decision regarding what topics to develop during the examination of S and which topics to reserve for cross-examination of the state's expert witnesses was based on sound trial strategy.

Argued November 29, 2021—officially released February 8, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Chaplin*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

J. Christopher Llinas, for the appellant (petitioner).

Linda F. Rubertone, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva Lenczewski*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Rodney Chase, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, he claims that the court incorrectly determined that he received effective assistance of trial counsel. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts from the petitioner's underlying criminal conviction; see *State* v. *Chase*, 154 Conn. App. 337, 107 A.3d 460 (2014), cert. denied, 315 Conn. 925, 109 A.3d 922 (2015); and procedural history are relevant. Between November, 2011, and March, 2012, the petitioner was a houseguest in the home of M, his wife, R, their daughter, Z, who was born in 2004, and their three year old son.[1] Id., 340, 364. One evening after Christmas, 2011, the petitioner sexually assaulted Z. Id., 340. The petitioner moved out of Z's home in March, 2012, and, approximately three weeks later, Z disclosed the assault

[1] In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity might be ascertained. See General Statutes § 54-86e.

to her parents. Id. The petitioner was charged with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), two counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A), and risk of injury to a child in violation of General Statutes § 53-21 (a) (2).

During the petitioner's criminal trial, the state presented expert testimony from two forensic interviewers, Donna Meyer and Theresa Montelli. Meyer, who had conducted a forensic interview of Z, testified regarding the format and protocol used during forensic interviews. Montelli testified, generally, concerning the tendency of children to delay reporting incidents of abuse, and explained that "there is almost always a delay in disclosure" in child sexual assault cases for a variety of reasons. The petitioner's trial counsel, Attorney Howard Gemeiner, presented the expert testimony of Suzanne Sgroi, a medical doctor with a child sexual abuse consulting practice who had reviewed the records in the petitioner's criminal case. On direct examination, Sgroi explained that, in her opinion, Meyer's forensic interview of Z was "very brief" and that "there were a great many things that should have been asked that were not . . . ." She further testified that certain aspects of the format of the interview, such as a lack of instructions, including telling the child to be truthful and not to guess, "could have had an influence on what [Z] might say subsequently in any setting." She also testified that it is "very important" to obtain a complete narrative of how the complainant came forward to disclose the abuse in order to "elicit enough details" to "make it a more credible kind of narrative" that "can be checked and verified," but that there was "very little effort on the part of . . . Meyer to get any of that additional detail." Following a jury trial, the petitioner was sentenced to a total effective sentence of ten years of incarceration and ten years of special

parole for his conviction of sexual assault in the first degree in violation of § 53a-70 (a) (2) and risk of injury to a child in violation of § 53-21 (a) (2).[2]

In 2018, the petitioner filed the operative amended petition for a writ of habeas corpus in which he alleged, inter alia, ineffective assistance of trial counsel for Gemeiner's failure to familiarize himself with the issue of disclosure in child sexual assault cases, the failure to cross-examine certain state's witnesses adequately, and the failure to consult with or to present an expert witness on the validity of claims of child sexual abuse. In its return, the respondent, the Commissioner of Correction, denied the allegations of ineffectiveness. Following trial, the habeas court issued a memorandum of decision denying the petition for a writ of habeas corpus and concluding that the petitioner had not demonstrated that Gemeiner's performance was deficient. Having so concluded, the court did not reach the question of whether the petitioner was prejudiced by Gemeiner's performance. The petitioner filed a petition for certification to appeal, which the court granted. This appeal followed. Additional facts and procedural history will be set forth as necessary.

"[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] . . . [i]t is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong

[2] The petitioner was also found guilty of two counts of sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A), but the court vacated the jury's verdicts on those two counts due to an error in the jury instructions.

. . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . Because both prongs of *Strickland* must be demonstrated for the petitioner to prevail, failure to prove either prong is fatal to an ineffective assistance claim." (Citations omitted; internal quotation marks omitted.) *Llera* v. *Commissioner of Correction*, 156 Conn. App. 421, 426–27, 114 A.3d 178, cert. denied, 317 Conn. 907, 114 A.3d 1222 (2015).

"[J]udicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . In reconstructing the circumstances, a reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Internal quotation marks omitted.) *Cancel* v. *Commissioner of Correction*, 189 Conn. App. 667, 693, 208 A.3d 1256, cert. denied, 332 Conn. 908, 209 A.3d 644 (2019). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 680, 51 A.3d 948 (2012).

"[T]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 637, 212 A.3d 678 (2019).

The crux of the petitioner's argument on appeal is that Gemeiner failed in a number of ways to undermine Z's version of events by relying on the undisputed fact that Z did not disclose the alleged sexual abuse until approximately three weeks after it allegedly occurred. The petitioner concludes that, had Gemeiner put more emphasis on this delay, the jury would have concluded that the delay in disclosure was an indication that the incident never occurred. As we consider the petitioner's arguments, we recognize that our courts have permitted expert testimony to be admitted in sexual assault cases to explain why delayed disclosure does not necessarily and inexorably lead to the conclusion that a sexual assault did not occur. "Because it is only natural for a jury to discount the credibility of a victim who did not immediately report alleged incidents . . . testimony that explains to the jury why a minor victim of sexual abuse might delay in reporting the incidents of abuse should be allowed as part of the state's case-in-chief." (Internal quotation marks omitted.) *State* v. *Francis D.*, 75 Conn. App. 1, 16, 815 A.2d 191, cert. denied, 263 Conn. 909, 819 A.2d 842 (2003).

The petitioner argues that the court erred in finding that Gemeiner's performance was based on sound trial strategy because there was no evidence in the record to demonstrate that he had a legitimate strategic reason for (1) failing to familiarize himself with the issue of delayed disclosure, (2) failing to consult with or to present an expert witness on the issue of delayed disclosure, or (3) failing to cross-examine the state's expert witness, Montelli, adequately on the issue of delayed

disclosure and that his cross-examination of her was "unfocused, disorganized, and rambling . . . ." He contends that Gemeiner testified at the habeas trial that he did not believe that the issue of delayed disclosure mattered in the petitioner's case, despite the fact that the state considered the issue to be so central that it presented expert testimony from Montelli on the subject of delayed disclosure of sexual abuse by children and, particularly, the fact that delayed disclosure was not necessarily evidence of untruthful disclosure. We are not persuaded.

We begin by setting forth our standard of review. "It is well settled that in reviewing the denial of a habeas petition alleging the ineffective assistance of counsel, [t]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constitutes a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Brewer* v. *Commissioner of Correction*, 189 Conn. App. 556, 562, 208 A.3d 314, cert. denied, 332 Conn. 903, 208 A.3d 659 (2019).

In the present case, the court rejected the petitioner's argument that Gemeiner failed to familiarize himself with the issue of delayed disclosure. It found that the petitioner failed to present credible evidence to demonstrate that Gemeiner had failed to achieve a reasonable degree of familiarity with materials relevant to child forensic interview protocol, disclosure literature, and validation criteria in preparation for the petitioner's criminal trial. The court noted that Gemeiner testified that he had significant experience with child sexual assault cases and that he "tried to read all materials on testing the veracity of children—beyond newspapers and magazines." (Internal quotation marks omitted.) Gemeiner also testified that he was "fairly consumed"

with researching the issue of testing the veracity of children in sexual assault cases and that he had consulted with and retained Sgroi. He also explained that he "didn't see anything in the time frame that was problematic" and that it did not matter whether the delay in disclosure was one day or four months. In his opinion, the problem was not the timing of the disclosure but rather that "there was no way to prove that [the petitioner] didn't have access to the child," because he was living in the home and had access to Z during the time of the alleged abuse. Even the testimony of the petitioner's expert at the habeas trial, Nancy Eiswirth, a clinical psychologist who had reviewed the trial testimony of Montelli and who had watched the video recording of Montelli's forensic interview of Z, highlighted concerns with a delayed disclosure defense. She testified that there is no association between a child's delayed disclosure of sexual abuse and her veracity and further stated that, because there is no definition of delayed disclosure, research on the topic is "questionable" and has "looked at everything from one day to years and years and years later." The court reasonably concluded that the petitioner had not overcome the presumption that Gemeiner's had familiarized himself with topics germane to child sexual assault cases.

Regarding the petitioner's argument that Gemeiner failed to consult with or to present an expert witness on the issue of delayed disclosure, the court found that Gemeiner credibly testified that he had retained Sgroi to help develop a theory of defense and concluded that he presented the testimony of Sgroi at the criminal trial to rebut the testimony and opinions provided by the state's expert witnesses. Gemeiner testified at the habeas trial that he thought it was "imperative" to have an expert in the petitioner's case, and that he met with and delivered the case materials to Sgroi to review prior to trial. As noted by the habeas court, Gemeiner's typical

practice when speaking with experts in criminal cases was to review all items in detail so as not to assume anything about the potential evidence. We cannot second-guess on appeal the court's credibility determinations regarding Gemeiner's testimony that he had retained Sgroi to assist with the defense. "The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . Appellate courts do not second-guess the trier of fact with respect to credibility. . . . It is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court." (Internal quotation marks omitted.) *Budziszewski* v. *Connecticut Judicial Branch*, 199 Conn. App. 518, 530, 237 A.3d 792, cert. denied, 335 Conn. 965, 240 A.3d 283 (2020).

Beyond crediting as true Gemeiner's testimony concerning his preparation for the trial, the court found that Gemeiner made a sound strategic decision at trial not to question Sgroi regarding delayed disclosure but rather to address the topic through cross-examination of the state's expert witness, Montelli. On cross-examination, Gemeiner questioned Montelli regarding whether there was a link between delayed disclosure and a child's veracity. Montelli testified: "I don't think one has to do with the other," but that she could not speak to the issue of credibility and that "[i]t's really up to the child's statement and hearing from the child the reasons why they delay." As the court aptly stated, the transcripts of the underlying criminal trial make clear that Gemeiner used Sgroi's testimony to rebut the testimony of the state's expert witnesses, namely, to opine on the faults in Meyer's technique in conducting the forensic interview of Z. The petitioner has not overcome the presumption that Gemeiner's decision regarding what topics to develop during the examination of Sgroi and which topics to reserve for cross-examination of

the state's expert witnesses was based on sound trial strategy. "Once an attorney makes an informed, strategic decision regarding how to cross-examine a witness, that decision is virtually unchallengeable." (Internal quotation marks omitted.) *Taft* v. *Commissioner of Correction*, 159 Conn. App. 537, 557, 124 A.3d 1, cert. denied, 320 Conn. 910, 128 A.3d 954 (2015). "An attorney's line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel's trial strategy. . . . The fact that counsel arguably could have inquired more deeply into certain areas, or failed to inquire at all into areas of claimed importance, falls short of establishing deficient performance." (Internal quotation marks omitted.) *Ruiz* v. *Commissioner of Correction*, 195 Conn. App. 847, 861, 227 A.3d 1049, cert. denied, 335 Conn. 915, 229 A.3d 729 (2020). Accordingly, after reviewing the record of both the trial and habeas proceedings, we conclude that the petitioner has failed to overcome the presumption that trial counsel's examination of Sgroi and cross-examination of Montelli represented a sound trial strategy.

Having carefully reviewed the issues raised by the petitioner, we conclude that the habeas court did not err when it concluded that the petitioner failed to prove that Gemeiner performed deficiently.

The judgment is affirmed.

In this opinion the other judges concurred.

STUART C. CARLSON ET AL. *v.*
VERNON F. CARLSON ET AL.
(AC 43007)

Elgo, Cradle and Flynn, Js.

Syllabus

The plaintiffs sought, inter alia, a partition of the assets and a dissolution of a family partnership, of which the plaintiffs and the named defendant

were original members. The plaintiffs claimed that there was significant discord among the members, including that the defendant occupied certain real property in Manchester owned by the partnership without paying rent and refused to remit rent received from nonpartner tenants. In 2015, the court dissolved the partnership and appointed R as a receiver to wind up the partnership and to sell certain real property owned by the partnership. Later that year, during the trial, the plaintiffs and the partnership reached a settlement agreement and submitted a partial settlement notice, which stated that issues remained in dispute between the plaintiffs and the defendant. Soon thereafter, the plaintiffs and the defendant reached a settlement agreement. In accordance with the settlement agreement, the trial was adjourned and certain real property was sold with partial distributions made to the parties, with the exception of the defendant, who was to receive a certain parcel of real property, the value of which was to be deducted from his share of funds generated from the sale of real property. In 2017, the court approved the receiver's report, over the defendant's objection, which authorized the receiver to proceed with an application for a subdivision of real property. In 2018, the application for the subdivision of the property was approved and the court thereafter granted the receiver's motion for an order for the authority to list the lots for sale. Later that year, the defendant moved to inspect and copy financial records of the partnership, which the court denied. The defendant did not then appeal from that judgment. In 2019, the defendant filed a counterclaim, without a request for leave to amend or motion to amend. The defendant appealed from the court's judgment granting the plaintiffs' motion to strike the defendant's counterclaim, but failed to brief that claim. In 2020, the court appointed P as receiver. Thereafter, the defendant amended his appeal five times, challenging other actions of the court. *Held*:

1. The portion of the defendant's appeal challenging the trial court's denial of his motions to inspect and copy corporate and partnership tax returns and his motion to compel further discovery was dismissed, the defendant having failed to properly appeal those rulings of the court.
2. The portions of the defendant's appeal challenging the trial court's failure to address the dispute in the presettlement notice among the parties before the settlement was reached and its failure to order the plaintiffs to release all claims during the 2015 settlement negotiations were dismissed: these events occurred nearly four years before the defendant filed the present appeal; moreover, these portions of the defendant's appeal are not from judgments of the court and are not judgments encompassed in his notice of appeal.
3. This court declined to review the defendant's claim that the trial court erred in authorizing an application for a subdivision of a property owned by the partnership as the claim was inadequately briefed, the defendant having failed to cite any statute, case law, rule of court, or other legal authority that could render the court's action improper.

4. The trial court did not err in appointing P as a receiver, as the appointment of a receiver is within the sound discretion of the trial court.

Argued November 9, 2021—officially released February 8, 2022

Procedural History

Action seeking, inter alia, the dissolution of a partnership, and other relief, brought to the Superior Court in the judicial district of Hartford, where the named defendant filed a counterclaim; thereafter, the court, *Noble*, *J.*, granted the plaintiffs' motion to strike the counterclaim, and the named defendant appealed to this court; subsequently, the court, *Noble*, *J.*, granted a receiver's motion for discharge of lis pendens filed by the named defendant on certain real property owned by the partnership, and the named defendant amended his appeal; thereafter, the court, *Noble*, *J.*, appointed Peter Carlson as receiver, and the named defendant amended his appeal. *Appeal dismissed in part*; *affirmed.*

Vernon F. Carlson, self-represented, the appellant (named defendant).

William G. Reveley, with whom, on the brief, was *Malcolm F. Barlow*, for the appellees (plaintiffs and defendant Kristine Carlson).

Opinion

PER CURIAM. The self-represented defendant, Vernon F. Carlson,[1] appeals from various judgments and actions of the trial court stemming from a 2007 action commenced by the plaintiffs, Stuart C. Carlson, Patricia

[1] Kristine Carlson, Karen Carlson, and Carlson Associates were also named as defendants when the plaintiffs commenced the underlying action. Kristine Carlson and Karen Carlson were removed as defendants in 2015. Following Karen Carlson's death in 2017, the court, in 2018, granted the motion of Kristine Carlson, administrator of the estate of Karen Carlson, to be made a party defendant. Carlson Associates remains a defendant in the action but did not participate in the present appeal. Our references in this opinion to the defendant are to Vernon F. Carlson.

W. Carlson, and Alexis S. Carlson,[2] and a subsequent settlement agreement that was reached by the parties in 2015. On appeal, the defendant claims that the court erred (1) in denying his motions to inspect and copy corporate and partnership tax returns, (2) by not addressing the dispute in the presettlement notice between the parties before a settlement was reached, (3) in not ordering the plaintiffs to release all claims during the 2015 settlement negotiations, (4) in authorizing an application for a subdivision of a property owned by the partnership, and (5) in appointing Peter Carlson as receiver. We conclude that the defendant's first three claims must be dismissed. As for the fourth and fifth claims, for the reasons set forth herein, we affirm the judgments of the court.

The court set forth the following facts and procedural history of the case in its February 5, 2020 memorandum of decision granting the plaintiffs' motion to terminate stay. "The long history of this case began with a complaint filed in 2007 by the plaintiffs . . . . The complaint alleged, and the parties do not dispute, that the parties were members of a partnership referred to as Carlson Associates. The parties possessed varying percentages of interest in the partnership. Stuart Carlson was alleged to have been the managing partner. The court file reveals that no written partnership agreement governed the relations among the partners or between the partners and the partnership. The plaintiffs alleged in their original complaint that the assets of the partnership consisted of fourteen parcels of real estate located in the towns of Manchester . . . and Glastonbury . . . and loans by Carlson Associates to Karen [Carlson], Kristine [Carlson] and the defendant. The two count

[2] Stuart C. Carlson died on January 23, 2011, and, on July 21, 2011, the plaintiffs moved to substitute Patricia W. Carlson, in her capacity as administratrix of the estate of Stuart C. Carlson, as a plaintiff in the action. On August 1, 2011, the court granted this motion.

complaint asserted claims for partition of the assets of the partnership and its dissolution. These claims were grounded on the existence of significant discord among the partners, which included the occupancy of Karen [Carlson] and the defendant of partnership properties without paying rent and the refusal to remit rent received from nonpartner tenants. Karen [Carlson] and the defendant were alleged to have refused to agree to the sale of any of the partnership properties although the expenses and liabilities of the partnership, including past due real property taxes, exceeded its income. Stuart [Carlson] and Patricia [Carlson] claimed in the complaint that they loaned money to the partnership without repayments, and further that the partnership loaned money to the defendant, Kristine Carlson and Karen Carlson, which had not been repaid. The plaintiffs additionally sought settlement of accounts and contributions between the [parties].

"After the filing of the complaint, four years lapsed with little activity. Stuart Carlson died on January 23, 2011, and Patricia Carlson, the administratrix of his estate, was substituted as a [plaintiff]. In 2012, the matter was dismissed for failure to prosecute and subsequently reopened. Three more years passed in the service of disagreement. During this time, the [plaintiffs] moved for court orders to sell four partnership properties in 2012. . . . The defendant objected. In 2013, the defendant moved for an order permitting him to inspect partnership records. . . . Later that year, the [plaintiffs] moved successfully, over the objection of the defendant, for a court order permitting the partnership to enter into a listing agreement with a real estate agent to market and sell the remaining properties. . . . The movants asserted that the defendant had refused to sign any listing agreement. In the meantime, foreclosure proceedings were commenced by the town of Glastonbury for unpaid property taxes. . . . Despite the foreclosure proceedings, the defendant continued to resist

the sale of the properties including those under contract. . . . The sale of the properties under contract was ultimately consummated, apparently in 2014. On May 26, 2015, the court . . . dissolved the partnership and appoint[ed] Richard Conti, Esq. as a receiver. . . . Despite multiple offers to purchase certain other properties of the partnership, the partners were unable to agree on their sale of the listing of other properties causing the offers to be withdrawn. . . .

"On November 17, 2015, the case came before the court for trial. The operative pleadings at the time of trial were the amended complaint dated November 9, 2015, and the answer with setoffs of the defendant, also dated November 9, 2015. At no time during the prior eight years during which the action was pending had the defendant asserted a counterclaim or cross claim. The [plaintiffs] reached a settlement agreement among themselves and with the partnership. On the fourth day of evidence, the defendant and the [plaintiffs] reached a settlement. The settlement included an adjournment of the trial and payment of $102,000 to Patricia Carlson. The remaining property was to be appraised and, with the exception of the property known as 637 South Main Street in Manchester, sold with the proceeds of the sales to be distributed among the partners according to their varying partnership percentages. The defendant was to receive the 637 South Main Street property, the value of which was to be deducted from his share of funds generated from the sale of the property. The bills of any creditors of the partnership and the receiver were to be paid before any distributions were made. Distributions to the partners were subject to the approval of the court, which was to retain jurisdiction of the matter for the winding down of the partnership assets and debts.

"Pursuant to the settlement agreement, including the adjournment of the trial, a number of properties owned

by the partnership were sold and partial distributions made to the parties with the exception of the defendant. The defendant made objections to both. . . . The defendant also objected at various times to the payment of fees to the receiver. . . . The attendant delay in making a distribution to the defendant involved the uncertainty relative to the value of the total assets of the estate and the value of the 63[7] South Main Street property. Disputes arose (1) between the defendant and an easement holder over 637 South Main Street, (2) whether the defendant and Karen Carlson remained indebted to the partnership as had previously been claimed by Stuart [Carlson] and Patricia Carlson and (3) whether to subdivide one of the parcels of property. Two attorneys' liens for work done on behalf of the defendant by two different attorneys were presented to the receiver for payment. The court declined to treat the attorneys' fees as partnership debt because it was work done primarily for the benefit of the defendant as evidenced by court filings. Any claims against the defendant and that might have remained after the settlement agreement were withdrawn, on the record and in a filing with the court, by the [plaintiffs]. The disagreement over the easement remains. The court granted approval, over the objection of the defendant, to subdivide the parcel at issue. [Karen] Carlson died in 201[7], and her interests were represented by [Kristine] Carlson as the executrix of the estate of [Karen] Carlson.

"On March 21, 2019, a counterclaim was, for the first time, asserted by [the defendant] against 'Patricia Carlson, Alexis Carlson, Kristine Carlson and Attorney William G. Reveley [counsel for the partnership, Patricia Carlson individually and as administratrix of Stuart Carlson's estate, and Alexis Carlson], Attorney Mary Rossettie [prior counsel for the estate] and the estates of Stuart C. Carlson and Karen Carlson.' The counterclaim was procedurally improper in that it was filed without

a request for leave to amend, or motion to amend, as required by Practice Book § 61-10. The counterclaim named two attorneys as defendants, who were not parties to the action without permission of the court as required by Practice Book § 10-11 and General Statutes § 52-102a. Moreover, the court interpreted the settlement agreement, involving an adjournment of the trial, as a general release of any and all claims the parties had against each other. Finally, the court notes that the conduct complained of by the defendant in his counterclaim, which asserts counts of breach of fiduciary duties and abuse of process, assert claims for conduct that is outside of the statute of limitations. On April 15, 2019, all the other parties joined in an objection, expressed through the vehicle of a motion to strike, to the counterclaim on the above grounds and together filed a motion to enforce the settlement agreement. The court granted the motions on May 28, 2019, ordered the counterclaim stricken, and the defendant appealed.

"On June 21, 2019, this court granted the joint motion of all parties excluding the defendant to terminate the automatic stay imposed by Practice Book § 61-11. The motion was limited to lifting any stay imposed on the filing of a Mylar,[3] necessary to effect the subdivision of 637 South Main Street, Manchester. The filing of the Mylar was a condition subsequent to the permitting of the property by the appropriate municipal boards. The receiver supported the lifting of the stay to file the Mylar because the liquid assets under his control were diminishing and the available partnership funds would become insufficient to pay its debts, a refrain commonly voiced over the prior years. The court, pursuant to Practice Book § 61-11 (d), granted the motion finding

[3] "A Mylar map is a map prepared on a thin polyester film suitable for recording on the land records." (Internal quotation marks omitted.) *500 North Avenue, LLC* v. *Planning Commission*, 199 Conn. App. 115, 118 n.2, 235 A.3d 526, cert. denied, 335 Conn. 959, 239 A.3d 320 (2020).

that although the [defendant] had not filed the appeal only for delay, the due administration of justice required the termination of stay.

"Thereafter, on July 19, 2019, the receiver filed a motion for discharge of lis pendens. In his motion, the receiver noted the active efforts underway to sell the remaining parcels including those that are subject to subdivision on Line Street in Manchester and two parcels to the rear of Line Street in Glastonbury. The receiver alerted the court that notices of lis pendens had been filed by the defendant on both parcels and moved for their discharge. The motion was joined by the [plaintiffs] and objected to by the defendant. The receiver, and the [plaintiffs], asserted that the two lis pendens were significantly impeding their ability to market and ultimately sell the properties. The receiver and the [plaintiffs] referred to the diminishing liquid funds from which to pay taxes and ongoing fees related to the winding down. On September 16, 2019, the court granted the motion to discharge from which order the defendant appealed by way of amendment to the original appeal. On January 2, 2020, the [plaintiffs] moved to terminate the stay attendant to the amended appeal of the order discharging the lis pendens. A hearing was held on the motion to terminate the stay on January 28, 2020."[4] (Footnote added.)

The following appellate procedural history is pertinent to our resolution of the defendant's appeal. On June 3, 2019, the defendant appealed from the court's May 28, 2019 judgment granting the plaintiffs' motion to strike his counterclaim. Thereafter, the defendant filed five amended appeals challenging other actions of the court. In his first amended appeal form, the defendant stated that he was appealing from the following:

[4] On February 5, 2020, the court granted the plaintiffs' motion to terminate the stay.

"motion for discharge of lis pendens, interim report of receiver, request for order." The defendant never briefed his appeal of the striking of his counterclaim, nor did he brief his appeal of the motion for discharge of lis pendens. These two claims on appeal are thus deemed abandoned.

The defendant's subsequent four amended appeals listed several other actions of the court. In his third amended appeal, he listed, among other things, that he was challenging the court's decision to appoint Peter Carlson as receiver. This claim is the only action from those four amended appeals that the defendant has briefed. The remaining claims listed in the amended appeal forms are thus deemed abandoned.

Additionally, this court dismissed portions of the defendant's appeal prior to oral argument. On February 20, 2020, this court granted the plaintiffs' motion to dismiss the defendant's second amended appeal, but only as to the portion of the appeal challenging the court's November 18, 2019 order terminating the appellate stay. On June 9, 2021, this court granted the plaintiffs' motion to dismiss the defendant's fifth amended appeal, which stated that he was appealing from his "objection to the filing of Carlson Associates' 2019 partnership federal income tax returns." Additional facts and procedural history will be set forth as necessary.

I

The defendant briefs that the court erred in denying his motions to inspect and copy corporate and partnership tax returns. The defendant's brief appears to challenge the court's rulings on two separate motions. First, on November 6, 2018, the defendant filed a "motion to inspect and copy financial records" of the partnership. On November 19, 2018, the court denied that motion. The defendant did not then appeal from that judgment, nor has he done so now on any of his appeal forms.

Second, on August 7, 2020, the defendant filed a motion to compel discovery of the 1986 income tax returns of SHVC, Inc.[5] On August 14, 2020, the court denied that motion. In its order denying the motion, the court stated: "The discovery is not calculated to lead to the discovery of admissible evidence as this case settled in 2015."

Practice Book § 61-9 provides in relevant part: "Should the trial court, subsequent to the filing of a pending appeal, make a decision that the appellant desires to have reviewed, the appellant shall file an amended appeal within twenty days from the issuance of notice of the decision as provided for in Section 63-1. . . ." The defendant did not amend his appeal to include a claim regarding the court's August 14, 2020 order denying his motion to compel further discovery. Because the defendant has not properly appealed either ruling, we cannot address his claim challenging those rulings. Accordingly, we must dismiss this portion of the appeal.

II

The defendant next briefs that the court erred by not addressing the dispute in the presettlement notice among the parties before a settlement was reached. It is unclear what judgment of the court from which the defendant appeals. The record indicates that on November 16, 2015, the plaintiffs, Kristine Carlson, and Karen Carlson filed a partial settlement notice indicating that they had reached a settlement in the underlying action. The notice stated: "Issues remain in dispute as between the plaintiffs and [the defendant]." The defendant's claim presumably stems from that notice, as we are unaware of any other presettlement notice filed by any

[5] In that motion, the defendant stated that SHVC, Inc., was a family owned real estate investing company, and that Carlson Associates was formed in 1986 after SHVC, Inc., was dissolved.

party. The settlement occurred on November 25, 2015, nearly four years before the defendant filed the present appeal. His brief does not reference any judgment from which he is appealing and none of his appeal forms reference any judgment concerning a presettlement notice. Accordingly, we must dismiss this portion of the appeal as it is not from a judgment of the court and it is not a judgment encompassed in his notice of appeal.

III

The defendant next briefs that the court erred in not ordering the plaintiffs to release all claims during the 2015 settlement negotiations. The claim he attempts to raise, like the claim he attempted to raise in part II of this opinion, concerns events that occurred nearly four years before the defendant filed the present appeal and is not from a judgment of the court. Furthermore, none of his appeal forms references any judgment concerning this matter. Accordingly, we must dismiss this portion of the appeal as it is not from a judgment of the court and it is not a judgment encompassed in his notice of appeal.

IV

The defendant next briefs that the court erred in authorizing an application for a subdivision of a property owned by the partnership. At the outset, we note that this claim that he now attempts to raise is not encompassed in his notice of appeal or amended notices. His first amended appeal, however, challenges the court's order allowing a receiver to market the lots created by the subdivision of that property. We reasonably can interpret the defendant's brief as challenging that order. Nevertheless, we decline to review this claim because it is inadequately briefed.

The following facts and procedural history are relevant to this claim. At all relevant times, the partnership

owned a property at 637 South Main Street in Manchester. On August 8, 2017, the receiver reported to the court that this property "consists of approximately eleven acres of land with an existing three family home and two barns. All partners are in agreement that the best way to sell the land left after subdividing off the front corner (which is to be conveyed to [the defendant] pursuant to the settlement reached by the partners) is to subdivide the remaining acreage into building lots." On September 11, 2017, the court issued an order approving of the receiver's report, which, in turn, authorized the receiver to proceed with an application for a subdivision of the property. The defendant did not appeal from the issuance of that order at that time or in his five later notices of appeal.

On September 5, 2018, the Planning and Zoning Commission of the Town of Manchester (commission) approved the application for a subdivision of the property. On October 15, 2018, the receiver filed a motion for an order in which he informed the court that the subdivision application had been approved and requested the authority to list the lots for sale at prices suggested by a local Realtor. On October 29, 2018, the court granted that motion. The defendant did not appeal from the granting of that motion.

On May 28, 2019, the defendant filed an objection to the "filing of resubdivision" of the property. The gist of the defendant's argument was that the subdivision application that was approved by the commission did not comply with the terms of the settlement agreement. The court did not rule on the defendant's objection.

The defendant's first amended appeal purports to appeal from the interim report of the receiver dated August 12, 2019, and from the request for an order. In that report, the receiver stated that "the resubdivision [of 637 South Main Street] is now perfected following

approval, and the lots created thereby are available to transfer/sell." The receiver asked the court "whether to direct the [R]ealtor to continue marketing the . . . lots" created by the subdivision. The court approved the report and order on September 16, 2019. In his brief to this court, the defendant states in the heading for this claim that "the trial court err[ed] in allowing a comprehensive subdivision instead of just obtaining an appraisal."

"Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.) *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

In the section of his brief regarding this claim, the defendant discusses matters that are unrelated to the subdivision of 637 South Main Street. He does not brief any statute, case precedent, rule of court, or other legal authority that could render the court's action improper. We, therefore, deem this claim inadequately briefed and decline to review it. Accordingly, we decline to review this portion of the defendant's appeal.

V

Finally, in his third amended appeal, the defendant claims that the court erred in appointing Peter Carlson as receiver. "The application for a receiver is addressed to the sound legal discretion of the court, to be exercised with due regard to the relevant statutes and rules, and such exercise is not to be disturbed lightly nor unless abuse of discretion or other material error appears." (Internal quotation marks omitted.) *Antonino* v. *Johnson*, 113 Conn. App. 72, 77, 966 A.2d 261 (2009), quoting *Chatfield Co.* v. *Coffey Laundries, Inc.*, 111

Conn. 497, 501, 150 A. 511 (1930). After reviewing and considering the record in this case, including the briefs and arguments of the parties on appeal, we conclude that the court did not abuse its discretion in appointing Peter Carlson as receiver. There is no error.

The appeal is dismissed with respect to all claims except the claims regarding the authorization of an application for a subdivision and the appointment of a receiver; those judgments are affirmed.

ADAM GLANZ *v.* COMMISSIONER OF MOTOR VEHICLES (AC 44189)

Bright, C. J., and Alvord and Norcott, Js.

Syllabus

The plaintiff, who had been arrested for operating a motor vehicle while under the influence of intoxicating liquor in violation of statute (§ 14-227a), appealed to the trial court from the decision of the defendant, the Commissioner of Motor Vehicles, suspending the plaintiff's motor vehicle operator's license and requiring the installation of ignition interlock devices on his motor vehicles pursuant to statute (§ 14-227b). Following the plaintiff's arrest, a police officer administered a breath alcohol test on him four times. Although the second test yielded a higher blood alcohol content result than the first, it was invalidated. Only the first and fourth tests yielded valid results, the fourth producing a lower result than the first. At the administrative hearing before the defendant's hearing officer, the plaintiff presented the testimony of an expert, P, that the second test had been scientifically valid and that the plaintiff's blood alcohol content had been rising from the time he operated his motor vehicle to the time when the tests were performed. The hearing officer found that P's testimony was informative but not persuasive. The plaintiff appealed to the trial court, claiming that the hearing officer improperly relied on the presumption in § 14-227b (g) that the results of blood alcohol tests commenced within two hours of operation of a motor vehicle were sufficient to indicate blood alcohol content at the time of operation and that the hearing officer had ignored the exception in the criminal statute, § 14-227a (b), that, if the results of a second blood alcohol test indicated that the ratio of alcohol in the blood was 0.1 percent or less and was higher than the results of the first test, the defendant was required to show that the test results and analysis

accurately reflected the plaintiff's blood alcohol content at the time of the alleged offense. The trial court rendered judgment dismissing the appeal, and the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on his claim that his right to procedural due process was violated by the administrative procedures contained in § 14-227b (g) regarding evidence of blood alcohol content in the context of a license suspension hearing: the hearing officer, having considered and found unpersuasive P's opinion that the results of the tests were unreliable, properly applied the permissive presumption that the breath alcohol test results were sufficient to indicate the plaintiff's blood alcohol content at the time of operation without the need for additional evidence; moreover, the state's interest in promoting traffic safety and performing license suspension hearings in an expeditious manner comported with the presumption in § 14-227b (g), and the plaintiff, as the subject of a license suspension hearing, was not entitled to all of the procedural protections available in a criminal proceeding, thus, the rising blood alcohol content exception in § 14-227a (b) was not applicable to the plaintiff; furthermore; substantial evidence in the record consisting of the plaintiff's valid breath alcohol test results demonstrated that his blood alcohol content was falling, not rising.
2. The trial court properly determined that § 14-227b and not § 14-227a applied to the plaintiff's administrative license suspension hearing; §14-227a (b) expressly provides that it applies to criminal prosecutions, and the plaintiff was the subject of a civil administrative license suspension hearing, which was governed by § 14-227b.

Argued October 18, 2021—officially released February 8, 2022

Procedural History

Appeal from the decision of the defendant suspending the plaintiff's motor vehicle operator's license and requiring the installation of ignition interlock devices on the plaintiff's vehicles, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Morgan Paul Rueckert, for the appellant (plaintiff).

John M. Russo, *Jr.*, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (defendant).

Opinion

NORCOTT, J. The plaintiff, Adam Glanz, appeals from the judgment of the Superior Court rendered in favor of the defendant, the Commissioner of Motor Vehicles (commissioner), dismissing his appeal from the decision of the commissioner suspending his motor vehicle operator's license for forty-five days, pursuant to General Statutes § 14-227b, and requiring ignition interlock devices in his motor vehicles for six months. On appeal, the plaintiff claims that (1) the presumption in § 14-227b (g) that the results of blood alcohol tests commenced within two hours of operation shall be sufficient to indicate blood alcohol content at the time of operation violates his right to due process under the federal constitution because it does not include an exception requiring the submission of additional evidence to prove the accuracy of the blood alcohol test results in the event that such test results reveal that the operator's blood alcohol level was rising, and (2) the court erred in concluding that the rising blood alcohol exception in the criminal statute for operating a motor vehicle while under the influence of intoxicating liquor or drugs, General Statutes § 14-227a (b), did not apply to his administrative license suspension hearing. We affirm the judgment of the Superior Court.

In its memorandum of decision, the court found the following facts. "On December 1, 2019, Officer [Kevin] Geraci of the South Windsor Police Department observed a vehicle speeding, crossing the solid yellow center line of the road, and revving its engine thereby creating loud exhaust noise. The officer pulled the vehicle over at 12:47 a.m. and identified the plaintiff as its operator. The officer smelled the odor of alcohol emanating from inside the vehicle. The plaintiff then admitted to recently drinking two beers. As a result of all of the foregoing, the officer asked the plaintiff to exit the vehicle so that the officer could administer the

standard field sobriety tests. During the conduct of the field sobriety tests, the plaintiff then admitted to recently drinking four beers. The plaintiff failed the standard field sobriety tests.

"In light of the foregoing, the officer arrested the plaintiff for violating . . . § 14-227a and transported the plaintiff to police headquarters. At the police headquarters, the plaintiff was read his *Miranda* rights [pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)] and the implied consent advisory. The plaintiff was allowed time to contact his attorney. The plaintiff initially refused to submit to the breath alcohol test, but then changed his mind and consented. The officer administered the breath test four times to the plaintiff. The first test was administered at 1:41 a.m. and yielded a result of 0.1066. The second test was administered at 2 a.m. and yielded a result of 0.1068, but was invalidated in the final calibration check of the equipment because of the presence of alcohol in the ambient air, apparently because the officer used hand sanitizer. The third test, administered at 2:03 a.m., did not produce a result because the external standard used to calibrate the equipment failed. The fourth test, administered at 2:12 a.m., produced a result of 0.0999."

On December 10, 2019, the plaintiff was issued a notice informing him of the suspension of his operator's license pursuant to § 14-227b unless he requested an administrative hearing.[1] The plaintiff requested such a hearing, and one was held before the commissioner's hearing officer on January 3, 2020, to determine whether the plaintiff's operator's license should be suspended.

[1] The plaintiff was arrested pursuant to the criminal statute, § 14-227a, for driving under the influence, and his driver's license was suspended pursuant to the civil statute, § 14-227b.

At the hearing, an A-44 form,[2] the breath alcohol test results, a narrative police report, and the plaintiff's driving history were admitted into evidence. The plaintiff also offered the testimony of Robert Powers, who has a Ph.D. in biochemistry, and a report from Powers. Powers testified that, on the basis of his assessment of the blood alcohol tests, the plaintiff's blood alcohol was rising from the time when he was operating his motor vehicle to the time when the tests were performed. He further stated that the second test was scientifically valid. After considering all the evidence, the hearing officer found the following: the police officer had probable cause to arrest the plaintiff; the plaintiff was operating a motor vehicle; the plaintiff was placed under arrest; and the plaintiff submitted to blood alcohol tests, the results of which indicated a blood alcohol content of 0.08 or more. The hearing officer also found that the expert testimony of Powers was informative but was not persuasive under § 14-227b. The hearing officer suspended the plaintiff's operator's license for forty-five days and required the installation of ignition interlock devices for six months.

The plaintiff appealed the decision of the hearing officer to the Superior Court. In his brief filed in the Superior Court, the plaintiff argued that the hearing officer improperly relied on the presumption in § 14-227b (g) to establish blood alcohol content at the time of operation and ignored the rising blood alcohol exception in the criminal statute for operating a motor vehicle

[2] "The A-44 report form is a form approved by the [D]epartment of [M]otor [V]ehicles for processing individuals arrested for driving while under the influence of intoxicating liquor." *Paquette* v. *Hadley*, 45 Conn. App. 577, 579 n.5, 697 A.2d 691 (1997). "The A-44 form is used by the police to report an arrest related to operating a motor vehicle under the influence and the results of any sobriety tests administered or the refusal to submit to such tests." (Internal quotation marks omitted.) *Nandabalan* v. *Commissioner of Motor Vehicles*, 204 Conn. App. 457, 461 n.5, 253 A.3d 76, cert. denied, 336 Conn. 951, 251 A.3d 618 (2021); see also General Statutes § 14-227b (c).

under the influence of intoxicating liquor or drugs, § 14-227a (b). The court issued a memorandum of decision dismissing the appeal. The court reasoned that the criminal statute, § 14-227a (b), which governs prosecutions for operating a motor vehicle while under the influence of intoxicating liquor or drugs, did not apply. The court concluded that "[t]he statutory presumption provided for in § 14-227b (g) applies and, as a result the alcohol test results are representative of the blood alcohol content of the plaintiff at the time he was operating his motor vehicle." The court further determined that the record contains substantial evidence to support the hearing officer's findings, including that the plaintiff's blood alcohol content was 0.08 or more at the time he was operating his motor vehicle. This appeal followed.

"[J]udicial review of the commissioner's action is governed by the Uniform Administrative Procedure Act [(UAPA), General Statutes §§ 4-166 through 4-189], and the scope of that review is very restricted. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Citation omitted; internal quotation marks omitted.) *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000).

I

The plaintiff claims that the hearing officer's reliance on § 14-227b (g) violated his right to due process under

the fourteenth amendment to the United States constitution because his blood alcohol test results indicated that he had a rising blood alcohol content, thereby showing that he had a lower blood alcohol content at the time of operation. He contends that the presumption in § 14-227b (g), that the results of blood alcohol tests commenced within two hours of operation are sufficient to demonstrate blood alcohol content at the time of operation, is unconstitutional because it does not contain an exception like its criminal statutory counterpart, § 14-227a (b).[3] We are not persuaded.

Although the plaintiff does not specify whether he is making a substantive or procedural due process claim, we interpret his claim, which concerns the constitutionality of the procedures in license suspension hearings, to invoke principles of procedural due process. Whether the plaintiff was deprived of his right to due process is a question of law over which our review is plenary. See *McFarline* v. *Mickens*, 177 Conn. App. 83, 100, 173 A.3d 417 (2017), cert. denied, 327 Conn. 997, 176 A.3d 557 (2018). "The fourteenth amendment to the United States constitution provides that the [s]tate [shall not] deprive any person of life, liberty, or property, without due process of law . . . . In order to prevail on his due process claim, the plaintiff must prove that: (1) he has been deprived of a property interest cognizable under the due process clause; and (2) the deprivation

[3] The plaintiff also claims that his right to due process under article first, § 8, of the Connecticut constitution was violated. Because the plaintiff has not provided a separate state constitutional analysis, we deem this claim abandoned. See, e.g., *State* v. *Courchesne*, 296 Conn. 622, 635 n.20, 998 A.2d 1 (2010). "In any event, [o]ur Supreme Court has repeatedly held that, as a general rule, the due process clauses of both the United States and Connecticut constitutions have the same meanings and impose similar limitations." (Internal quotation marks omitted.) *Kostrzewski* v. *Commissioner of Motor Vehicles*, 52 Conn. App. 326, 335 n.6, 727 A.2d 233, cert. denied, 249 Conn. 910, 733 A.2d 227 (1999).

of the property interest has occurred without due process of law. . . . A driver's license, as a property interest, may not be suspended or revoked without due process of law. . . . [D]ue process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands. . . .

"In *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the Supreme Court indicated that to determine the level of procedural due process necessary, we must consider three factors: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedure used and the probable value, if any, of additional substitute procedural safeguards and (3) the state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." (Citations omitted; internal quotation marks omitted.) *Kostrzewski* v. *Commissioner of Motor Vehicles*, 52 Conn. App. 326, 336–37, 727 A.2d 233, cert. denied, 249 Conn. 910, 733 A.2d 227 (1999). "One who challenges the constitutionality of a statute bears the heavy burden of overcoming the presumption of its constitutional validity and of establishing the statute's invalidity beyond a reasonable doubt." (Internal quotation marks omitted.) *Dumont* v. *Commissioner of Motor Vehicles*, 48 Conn. App. 635, 643, 712 A.2d 427, cert. denied, 245 Conn. 917, 717 A.2d 234 (1998).

Section 14-227b (g) provides in relevant part that administrative hearings before the commissioner "shall be limited to a determination of the following issues . . . (3) . . . did such person refuse to submit to such test or analysis or did such person submit to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis

indicated that such person had an elevated blood alcohol content . . . . In the hearing, the results of the test or analysis shall be sufficient to indicate the ratio of alcohol in the blood of such person at the time of operation, provided such test was commenced within two hours of the time of operation. . . .''[4]

The plaintiff argues that the application of § 14-227b (g) violated his right to due process because it contains an ''irrebutable, irrational, illogical and thus unconstitutional'' mandatory presumption that the hearing officer find that the results of a blood alcohol test, if commenced within two hours of operation, is indicative of a plaintiff's blood alcohol content at the time of operation *without* providing for a rising blood alcohol content exception. He contends that the statutory scheme in the parallel criminal proceeding for operating a motor vehicle while under the influence includes such a rising blood alcohol content exception in § 14-227a (b) when it provides that it is a ''rebuttable presumption that the results of such chemical analysis establish the ratio of alcohol in the blood of the defendant at the time of the alleged offense, except that if the results of the additional test indicate that the ratio of alcohol in the blood of such defendant is ten-hundredths of one per cent or less of alcohol, by weight, and is higher than the results of the first test, evidence shall be presented that demonstrates that the test results and the analysis thereof accurately indicate the blood alcohol content at the time of the alleged offense.'' General Statutes § 14-227a (b). He argues that this exception is constitutionally required in license suspension proceedings because, without it, the state can deprive the plaintiff

[4] For purposes of § 14-227b, ''elevated blood alcohol content'' is defined as ''a ratio of alcohol in the blood of such person that is eight-hundredths of one per cent or more of alcohol, by weight . . . .'' General Statutes § 14-227b (n) (1).

of a vested right based on a presumption that is "illogical and mandatory." [5]

Applying the *Matthews* v. *Eldridge*, 424 U.S. 335, criteria to the present case, we conclude that, although the plaintiff has a significant private interest in the use and enjoyment of his operator's license, the risk of erroneous deprivation from the *proper* application of the presumption in § 14-227b (g) is low. In particular, we determine, in the exercise of our plenary review over issues of statutory interpretation; see *Ives* v. *Commissioner of Motor Vehicles*, 192 Conn. App. 587, 595, 218 A.3d 72 (2019); that the presumption in § 14-227b (g) that the test results "shall be sufficient" to indicate the operator's blood alcohol content at the time of operation is not, as the plaintiff contends, mandatory. Rather, the statute, by its plain and unambiguous language that the test results "shall be sufficient," permits, but does not require, the hearing officer to infer a plaintiff's blood alcohol content at the time of operation from the blood alcohol test results alone, without the need for additional evidence. See General Statutes § 14-227b (g). As a result, the statute creates a permissive presumption. See, e.g., *Bancroft* v. *Commissioner of Motor Vehicles*, 48 Conn. App. 391, 401–403, 710 A.2d 807 (permissive inference or presumption allows but does not require trier of fact to infer elemental fact from proof by prosecutor), cert. denied, 245 Conn. 917, 717 A.2d 234 (1998); see also *Reid* v. *Landsberger*, 123 Conn. App. 260, 283, 1 A.3d 1149 (where words of statute are plain and unambiguous, intent of drafters derived from words used), cert. denied, 298 Conn. 933, 10 A.3d 517 (2010). The presumption may be overcome if the hearing officer determines that the chemical alcohol

[5] As the plaintiff notes, the rising blood alcohol exception was incorporated in the administrative proceedings under § 14-227b (g) until 2009, when the legislature, in amending the statute, removed such language. Public Acts 2009, No. 09-187, § 63.

test results are unreliable. See *Crandlemire* v. *Commissioner of Motor Vehicles*, 117 Conn. App. 832, 844–45, 982 A.2d 212 (2009). In the present case, the record reflects that the hearing officer considered and found unpersuasive Powers' opinion that the results of the chemical alcohol tests were unreliable. Thus, the hearing officer properly applied the permissive presumption that the test results accurately reflected the plaintiff's blood alcohol content at the time of operation.

Finally, the state has a significant interest in promoting public safety and in performing license suspension hearings in an expeditious manner. By permitting the results of blood alcohol tests performed within two hours of operation to be sufficient to indicate the operator's blood alcohol content at the time of operation *without* requiring the presentation of additional evidence of blood alcohol content and without creating a rebuttable presumption that requires additional evidence to be submitted to prove the accuracy of the blood alcohol tests under certain circumstances, the administrative statutory scheme promotes the state's interest in removing potentially dangerous drivers from the roadways through expeditious license suspension hearings. Although the plaintiff argues that the rising blood alcohol exception in the criminal statute counterpart should apply in civil license suspension hearings, this argument ignores the different purposes of the civil and criminal proceedings relating to operation of a motor vehicle while under the influence of intoxicating liquor or drugs. There are several procedural protections that are expressly included in the criminal counterpart, § 14-227a (b),[6] that are not included in the civil

[6] General Statutes § 14-227a (b) provides: "Except as provided in subsection (c) of this section, in any criminal prosecution for violation of subsection (a) of this section, evidence respecting the amount of alcohol or drug in the defendant's blood or urine at the time of the alleged offense, as shown by a chemical analysis of the defendant's breath, blood or urine shall be admissible and competent provided: (1) The defendant was afforded a reasonable opportunity to telephone an attorney prior to the performance of

statute, however, "a license suspension hearing is not a criminal proceeding and . . . the subject of such a hearing is not entitled to all of the procedural protections that would be available in a criminal proceeding. . . . [T]he legislative history of § 14-227b reveals that a principal purpose [of] the enactment of the statute was to protect the public by removing potentially dangerous drivers from the state's roadways with all dispatch compatible with due process. . . . [L]icense suspension proceedings, the primary purpose of which is to promote public safety by removing those who have demonstrated a reckless disregard for the safety of others from the state's roadways [are distinguishable] from

the test and consented to the taking of the test upon which such analysis is made; (2) a true copy of the report of the test result was mailed to or personally delivered to the defendant within twenty-four hours or by the end of the next regular business day, after such result was known, whichever is later; (3) the test was performed by or at the direction of a police officer according to methods and with equipment approved by the Department of Emergency Services and Public Protection and was performed in accordance with the regulations adopted under subsection (d) of this section; (4) the device used for such test was checked for accuracy in accordance with the regulations adopted under subsection (d) of this section; (5) an additional chemical test of the same type was performed at least ten minutes after the initial test was performed or, if requested by the police officer for reasonable cause, an additional chemical test of a different type was performed to detect the presence of a drug or drugs other than or in addition to alcohol, provided the results of the initial test shall not be inadmissible under this subsection if reasonable efforts were made to have such additional test performed in accordance with the conditions set forth in this subsection and such additional test was not performed or was not performed within a reasonable time, or the results of such additional test are not admissible for failure to meet a condition set forth in this subsection; and (6) evidence is presented that the test was commenced within two hours of operation. In any prosecution under this section it shall be a rebuttable presumption that the results of such chemical analysis establish the ratio of alcohol in the blood of the defendant at the time of the alleged offense, except that if the results of the additional test indicate that the ratio of alcohol in the blood of such defendant is ten-hundredths of one per cent or less of alcohol, by weight, and is higher than the results of the first test, evidence shall be presented that demonstrates that the test results and the analysis thereof accurately indicate the blood alcohol content at the time of the alleged offense."

criminal proceedings, the primary purpose of which is punishment." (Citations omitted; internal quotation marks omitted.) *Do* v. *Commissioner of Motor Vehicles*, 330 Conn. 651, 679, 200 A.3d 681 (2019). The presumption in § 14-227b (g), which allows the results of blood alcohol tests *alone* to be sufficient evidence of the operator's blood alcohol content at the time of operation, comports with the state's interest in license suspension hearings, which is not punishment but, rather, the promotion of traffic safety with all dispatch compatible with due process. It also promotes the state's interest in traffic safety by allowing for the suspension of the driver's licenses of dangerous drivers who, immediately upon ingesting intoxicating liquor that will render them unable to drive safely for several hours, attempt to drive to their destination quickly before the alcohol is absorbed fully. Accordingly, the plaintiff has not demonstrated that the statute facially violates his right to procedural due process in a license suspension hearing.

The plaintiff also argues that the statutory presumption in § 14-227b (g) is unconstitutional as applied to him because the hearing officer failed to apply the rising blood alcohol content exception in his case. As noted previously in this opinion, the hearing officer considered Powers' testimony regarding the reliability of the test results. The hearing officer simply found Powers' testimony not persuasive. Thus, the record does not reflect that the hearing officer treated the test results as mandating a finding regarding the plaintiff's blood alcohol content at the time of operation or that he disregarded out of hand the purported evidence that the plaintiff's blood alcohol content was rising.

Furthermore, there was substantial evidence in the record that the *valid* test results do not indicate a rising blood alcohol content. The first test yielded a result of 0.1066, but the second test, on which the plaintiff relies to demonstrate a rising blood alcohol content, was

invalidated. The third test did not produce a result, and the fourth test yielded a blood alcohol content result of 0.0999, which is lower than the result obtained from the first test. Accordingly, because the valid test results from the first and fourth tests indicate a falling blood alcohol content, the facts underlying the plaintiff's as applied challenge to § 14-227b (g) do not exist.[7] For the foregoing reasons, we conclude that the plaintiff's right to procedural due process was not violated by the administrative procedures that are set forth in § 14-227b (g) regarding evidence of blood alcohol content in the context of a suspension hearing.

II

Alternatively, the plaintiff claims that the court erred in concluding that the rising blood alcohol exception in the criminal statute, § 14-227a (b), did not apply to his administrative license suspension hearing.[8] We disagree.

The criminal statute, § 14-227a (b), expressly provides that it applies "in any *criminal prosecution*" for violation of § 14-227a (a), which mandates that "[n]o person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both." (Emphasis added.) The present case is not a criminal

[7] Although the plaintiff argues that the unrebutted evidence from his expert, Powers, reveals that the second test was scientifically valid, the hearing officer did not find Powers to be credible. "The hearing officer is not required to believe unrebutted expert testimony, but may believe all, part or none of such unrebutted expert evidence." (Internal quotation marks omitted.) *Dumont* v. *Commissioner of Motor Vehicles*, supra, 48 Conn. App. 641.

[8] The plaintiff further argues that, in the court's alternative analysis, in which it determined that, even if the criminal statute were to apply then the rising blood alcohol exception contained therein nonetheless is not applicable, the court erred when it rounded rather than truncated the results of the second test in noting that the results of the second test were lower than the results of the first test. Because we determine that the criminal statute does not apply, we need not address this argument.

prosecution under § 14-227a (a), but rather involves a civil administrative license suspension hearing, which proceedings are governed by § 14-227b. "[T]he legislative scheme [of §§ 14-227a and 14-227b] establishes two separate and distinct proceedings. The administrative suspension of an operator's license is under the jurisdiction of the [D]epartment of [M]otor [V]ehicles and the prosecution of the underlying offense of driving while intoxicated falls within the jurisdiction of the criminal justice system. . . . It is clear that the legislative scheme of §§ 14-227a and 14-227b intended two separate and distinct proceedings, each under the jurisdiction of a different governmental branch." (Citations omitted; internal quotation marks omitted.) *State* v. *Gracia*, 51 Conn. App. 4, 10–11, 719 A.2d 1196 (1998). We conclude that the court properly determined that § 14-227b applies in the present case and properly decided that there was substantial evidence in the record to support the hearing officer's conclusion that the plaintiff had an elevated blood alcohol content at the time of operation.

The judgment is affirmed.

In this opinion the other judges concurred.

CITY OF SHELTON *v.* CONNECTICUT STATE BOARD OF LABOR RELATIONS ET AL.
(AC 44266)

Elgo, Alexander and Suarez, Js.

Syllabus

The plaintiff city appealed to the trial court from the decision of the defendant State Board of Labor Relations determining that the city had changed its process for evaluating candidates for promotion within its workforce without negotiation with the defendant union in violation of the Municipal Employees Relations Act (§ 7-467 et seq.). The trial court rendered judgment vacating the decision and orders of the board, from which the board appealed to this court. *Held* that, upon this court's

review of the record, and the briefs and arguments of the parties, the judgment of the trial court was affirmed; because the trial court thoroughly addressed the issues raised in this appeal, this court adopted the trial court's well reasoned memorandum of decision as a proper statement of the facts and the applicable law on the issues.

Argued October 18, 2021—officially released February 8, 2022

Procedural History

Appeal from the decision of the named defendant determining that the plaintiff's change in its process for the promotion of certain municipal employees violated the Municipal Employees Relations Act, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani*, *J.*; judgment for the plaintiff, from which the named defendant appealed to this court. *Affirmed.*

Frank N. Cassetta, general counsel, with whom were *John Brian Meskill*, assistant general counsel, and, on the brief, *Harry B. Elliot*, *Jr.*, former general counsel, for the appellant (named defendant).

Mark J. Sommaruga, for the appellee (plaintiff).

Barbara J. Resnick, filed a brief for the appellee (defendant Shelton Police Union, Inc.).

Kari L. Olsen and *Madiha M. Malik* filed a brief on behalf of the Connecticut Conference of Municipalities as amicus curiae.

Opinion

PER CURIAM. The defendant State Board of Labor Relations (board) appeals from the judgment of the Superior Court sustaining the appeal of the plaintiff, the city of Shelton, from the decision of the board in favor of the defendant Shelton Police Union, Inc.

(union).[1] On appeal, the board claims that the court improperly concluded that the board's decision was erroneous as a matter of law and predicated on factual findings that were not supported by the record. We affirm the judgment of the Superior Court.

The following facts and procedural history are relevant to this appeal. The plaintiff is a municipal employer within the meaning of the Municipal Employee Relations Act (act), General Statutes § 7-467 et seq.,[2] and the union is the sole and exclusive bargaining agent for the plaintiff's police department.[3] The plaintiff and the union were parties to a collective bargaining agreement dated July 1, 2016 (agreement). Section 17.01 of the agreement specifies the following scheme for promotions of union members: "Promotions will be made in accordance with the provisions of the Merit System of the [plaintiff]. Promotional opportunities will be posted with sufficient time to prepare for the examination and a list of study materials will be provided. Challenges to the promotional testing results shall be in accordance with Section 29.03A" of the agreement.

[1] The plaintiff's appeal to the Superior Court named only the board and the union as defendants. The board and the union filed separate appeals to this court from the Superior Court's judgment. The union withdrew its appeal on November 25, 2020, but filed a brief in support of the board's appeal. We also note that, on February 18, 2021, this court granted the Connecticut Conference of Municipalities permission to file an amicus curiae brief on behalf of the plaintiff.

[2] General Statutes § 7-467 (1) defines a municipal employer as "any political subdivision of the state, including any town, city, borough, district, district department of health, school board, housing authority or other authority established by law, a private nonprofit corporation which has a valid contract with any town, city, borough or district to extinguish fires and to protect its inhabitants from loss by fire, and any person or persons designated by the municipal employer to act in its interest in dealing with municipal employees . . . ."

[3] The union's membership, by definition, excludes "supernumeraries, school crossing guards, the Chief of Police and any employee holding the rank of captain and above and any employee acting as second-in-command of the police department."

At the time that the agreement was ratified, promotion of the plaintiff's municipal employees was governed by Shelton Municipal Ordinance No. 896. Under the terms of that ordinance, the plaintiff's administrative assistant was to first classify the examination process as "open competitive" or "promotional" and then implement "[e]xamination and testing . . . in accordance with the job description." The plaintiff's board of aldermen amended that ordinance in February, 2018, by enacting Shelton Municipal Ordinance No. 908, which granted the plaintiff's administrative assistant "discretion [to] limit the applications" for open positions "to [the plaintiff's] employees and proceed with only a promotional examination."

In the spring of 2018, the plaintiff faced an increased need for lieutenants within its police department. On April 6, 2018, the chief of police contacted the plaintiff's administrative assistant, who then posted notice of openings for the lieutenant position. Five officers applied for the positions and, in accordance with Ordinance No. 908, completed an oral examination as part of the application process. Three of those applicants subsequently were promoted to the rank of lieutenant.

On February 19, 2019, the union filed an administrative appeal with the board. The union alleged that, by removing the written component of the promotional exam without "discuss[ion] or negotiat[ion] with the [u]nion," the plaintiff violated General Statutes § 7-470 (c) of the act. The appeal was heard before the board on July 19, 2019. On March 10, 2020, the board issued its decision and held, inter alia, that the plaintiff's failure to include a written examination as part of the promotion process violated the act insofar as it unilaterally changed a material condition of employment. In reaching that conclusion, the board relied in part on its findings that, in 1977, the plaintiff had enacted an ordinance

allotting the relative weights of written and oral examinations at 50 percent each, and that administrating the examinations accordingly was "clearly enunciated and consistent" and "an accepted practice by both parties."

Following the board's decision, the plaintiff appealed to the Superior Court on April 23, 2020. The plaintiff argued that it was aggrieved by the board's decision, that the board improperly interpreted the agreement, and that certain facts found by the board were not supported by substantial evidence.

On September 10, 2020, the court issued a memorandum of decision sustaining the plaintiff's appeal. The court first noted that, under General Statutes § 4-474 (g) of the act, only three enumerated adjustments to municipal policy governing merit examinations must first be subject to collective bargaining: "(1) [t]he necessary qualifications for taking a promotional examination; (2) the relative weight to be attached to each method of examination; and (3) the use and determination of monitors for written, oral, and performance examinations." The court disagreed with the board's application of § 4-474 (g) (2) and reasoned that, because a written examination was not mandated, its elimination did not constitute a change in the "relative weight" of examination methods.[4] The court further emphasized that the plain language of the agreement afforded the plaintiff great latitude in implementing its own procedures for promotion. As a result, the court concluded that the agreement necessarily encompassed adjustments to the promotion scheme at the discretion of the plaintiff.

After reviewing the record, the briefs submitted to this court, and the arguments of the parties on appeal,

[4] The court also observed that the weight requirement specified in the 1977 ordinance "required [only] that, if the process contained both oral *and* written components, they would be weighted equally." (Emphasis added.)

we conclude that the judgment of the Superior Court should be affirmed. We hereby adopt the court's thorough and well reasoned memorandum of decision as a definitive statement of the applicable facts and law on the issues raised in this appeal. See *Shelton* v. *State Board of Labor Relations*, Superior Court, judicial district of New Britain, Docket No. CV-20-6059611-S (September 10, 2020) (reprinted at 210 Conn. App. 534, A.3d). Any further discussion would be superfluous. See, e.g., *Nussbaum* v. *Dept. of Energy & Environmental Protection*, 206 Conn. App. 734, 742, 261 A.3d 1182, cert. denied, 339 Conn. 915, 262 A.3d 134 (2021).

The judgment is affirmed.

APPENDIX

CITY OF SHELTON *v.* CONNECTICUT STATE BOARD OF LABOR RELATIONS ET AL.*

Superior Court, Judicial District of New Britain,
Administrative Appeals Session
File No. CV-20-6059611-S

Memorandum filed September 10, 2020

Proceedings

Memorandum of decision on plaintiff's appeal from decision by named defendant finding violation of Municipal Employees Relations Act. *Judgment for plaintiff.*

Mark J. Sommaruga, for the plaintiff.

Harry B. Elliott, Jr., general counsel, for the defendant State Board of Labor Relations.

* Affirmed. 210 Conn. App. 529, A.3d (2022).

Barbara J. Resnick, for the defendant Shelton Police Union, Inc.

Opinion

CORDANI, J.

INTRODUCTION

The City of Shelton (city) appeals a final decision of the Connecticut State Board of Labor Relations (board) finding that the city violated the Municipal Employees Relations Act, General Statutes § 7-467 et seq. (MERA), by changing its process for evaluating candidates for promotion within the city's workforce without negotiation with the Shelton Police Union (union).

FACTS AND PROCEDURAL HISTORY

At all times relevant to this appeal, the city and the union had a long-standing collective bargaining relationship and had been parties to a collective bargaining agreement, the most recent version of which became effective on July 1, 2016 (CBA). The CBA § 17.01 provides:

"*Promotions will be made in accordance with the provisions of the Merit System of the City of Shelton.* Promotional opportunities will be posted with sufficient time to prepare for the examination and a list of study materials will be provided. Challenges to the promotional testing results shall be in accordance with Section 29.03A."[1] (Emphasis added.)

[1] Section 29.03A refers to a September 18, 2003 memorandum of understanding which is attached to the CBA and provides procedures to be followed to allow candidates to challenge results on written tests given for promotional purposes.

The merit system of the city is defined by city ordinance.[2] Prior to February 9, 2018,[3] the merit system of the city was provided for in Ordinance 896.[4] Ordinance 896 provided in pertinent part:

"All appointments to positions within the classified service of the City of Shelton shall be made as provided herein. *Examination and testing shall be established* in accordance with the job description *by the* [*A*]*dministrative* [*A*]*ssistant* who shall first determine whether an examination shall be open competitive or promotional. . . .

"The examination process shall be of a practical nature and shall relate to subjects which fairly measure the relative capabilities of the person examined to execute the duties and responsibilities of the position sought. The [*A*]*dministrative* [*A*]*ssistant may adopt or authorize* the use of any procedures as deemed appropriate to assure a selection of employees on the basis of merit and qualifications. . . .

[2] Although the CBA uses "Merit System" in capital letters, it does not define the term. The only place in the record where the merit system is defined in written documents is in the city ordinances. The city ordinances, in particular Ordinance 896, provide a definition of the merit system, explaining in detail how the system is applied and how it operates. See Record Exhibit 17, pages 248–66 for Ordinance 896 entitled "Merit System and Personnel Rules." See also Record page 296 for a history of amendments to these merit system ordinances from 1985 through 2016. As required, these ordinances are adopted through the normal legislative process of the city which process is open to the public.

[3] The foregoing Ordinance is entitled "Merit System and Personnel Rules" and is found in the Record at Exhibit 17, pages 248–66. The city's ordinances concerning the merit system have been amended by the city on a multitude of occasions over the years, but the details of the changes are not specifically reflected in the record. See Record page 296 for a history of amendments to these merit system ordinances from 1985 through 2016.

[4] A 1977 ordinance provided: "Effective immediately *any* written and oral examinations *specified in the requirement sections* of all ordinances dealing with job descriptions will be weighed equally, 50% written and 50% oral." (Emphasis added.) Shelton, Conn., Code of Ordinances.

"Examinations for positions within the classified service shall be competitive and *may include* written, practical and oral interview test components. All applicants meeting the prescribed requirements shall be allowed to participate in the initial test component and shall be notified, in writing, of the time, place and date of the initial test." (Emphasis added.) Shelton Code of Ordinances, c. 2, Art. VI, § 2-312 (a), (b), and (e).

On February 9, 2018, the city adopted a new ordinance (2018 Ordinance)[5] concerning the merit system with the goal of enhancing promotion from within the city's ranks, which new ordinance provided in pertinent part:

"Upon the recommendation of the Department Head that there are qualified employees presently employed by the City, including both full time and part time employees, who are qualified to perform the job that is opened, *the Administrative Assistant may, in his sole discretion, limit the applications to City employees and proceed with only a promotional examination.*" (Emphasis added.) Shelton Code of Ordinances, c. 2, art. VI, § 2-301 (7.1.1).

It is the adoption and implementation of this 2018 Ordinance that the union challenged. The board factually found that "since on or before October, 1981, to February, 2018, the promotional process for bargaining unit members entailed participation by qualified candidates in written and oral examinations, each having a relative weight of fifty percent (50%) in determining each candidate's final score." (Footnote omitted.)

In April of 2018, it was determined that there was a need for additional lieutenants in the city's police

[5] See Record Exhibit 18, pages 267–352. Again, this ordinance, which amends the previous merit system ordinances, defines the merit system and provides significant details concerning the applicability and operation of the merit system.

department. In accordance with the 2018 Ordinance, the department head, [the] chief of police, notified the administrative assistant that several employees within the city's police department were qualified for the new positions. The administrative assistant then engaged the internal promotion process provided for in the 2018 Ordinance. Five internal candidates applied for the three available positions. All of the candidates who applied were subjected to oral examination, determined to be qualified and ranked. All five were placed on a certified list of eligible candidates. The police chief then selected three candidates from the list. No written examination was given in the process.

The union claimed that the adoption of the 2018 Ordinance and its implementation in the promotion of the three police lieutenants amounted to a unilateral change in the material conditions of employment by the city without the mandatory negotiation with the union. In particular, the union claimed that conducting the promotional process without a written examination was an improper unilateral change made without negotiation with the union. The city admits that it did not negotiate with the union over the adoption of the 2018 Ordinance or its implementation in the promotion of the lieutenants without a written examination. The union then filed a complaint with the board.

The matter was heard before the board on July 19, 2019. Testimony was taken and evidence entered into the record. On March 10, 2020, the board issued its final decision which concluded that the city violated MERA by unilaterally changing the promotion process to eliminate the written examination portion of the process, thereby changing the mandatory equal weighting between written and oral exams. The city then appealed the board's final decision to this court.

The city is aggrieved because it has exhausted its administrative remedies and appeals a final adverse

decision of the board finding that the city violated MERA and compelling the city to change its promotional process.

STANDARD OF REVIEW

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.[6] Judicial review of an administrative decision in an appeal under the UAPA is limited. *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) Id.

Although the courts ordinarily afford deference to the construction of a statute applied by the administrative

[6] General Statutes § 4-183 (j) provides in relevant part: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. . . ."

agency empowered by law to carry out the statute's purposes, "[c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

ANALYSIS

The board's final decision finds that the city violated MERA by removing the written examination from the promotional process without negotiation with the union. Specifically the board found that the fact that the promotional process contained a mandatory written examination[7] weighted at 50 percent of the candidate's overall score was a material term and condition of employment and could not be changed without negotiation with the union. Based upon the foregoing violation, the board ordered various remedies.

Pursuant to General Statutes § 7-474 (g), the merit system, once established, is not subject to mandatory negotiation, except for three particular topics specified in the statute, which statute provides in pertinent part:

"The conduct and the grading of merit examinations, the rating of candidates and the establishment of lists from such examinations and the initial appointments from such lists and any provision of any municipal charter concerning political activity of municipal employees shall not be subject to collective bargaining, provided once the procedures for the promotional process have been established by the municipality, any changes to the process proposed by the municipality

[7] The board's decision thus depends upon its finding that the city's merit system absolutely required a written examination, and therefore proceeding without a written examination changed the relative weight to be attached to each method of examination.

concerning the following issues shall be subject to collective bargaining: (1) The necessary qualifications for taking a promotional examination; (2) the relative weight to be attached to each method of examination; and (3) the use and determination of monitors for written, oral and performance examinations. . . .''

Here the board found that the administration of a written examination was required by the merit system, and therefore by conducting the promotional process without a written examination, the city changed the relative weight to be attached to each method of examination without negotiation. However, as found by the court below, the city's merit system did not require a written examination, and accordingly, the city's choice to act in accordance with its merit system and not employ a written examination was not a change in the relative weight to be attached to each method of examination. Thus the exception in § 7-474 (g) was not engaged and no negotiation was required.

The court begins its analysis by examining what the CBA provided for concerning the city's merit system promotional process. The CBA § 17.01 provides: ''Promotions will be made in accordance with the provisions of the Merit System of the City of Shelton.''[8] The foregoing provision is subject to only two possible interpretations. First, the provision could mean that promotions will be made in accordance with the city's merit system as it existed at the time that the CBA was entered into, namely, July 1, 2016. In the alternative, the provision could mean that promotions will be made in accordance with the city's merit system as that system is amended

[8] The CBA further provides for a process of challenging the test results, however it is clear that this challenge process is directed to case-by–case challenges of individual candidates. Thus, if a particular candidate believes that there was a mistake in scoring, that candidate may challenge the particular score(s) through the specified challenge process. Thus, this challenge process adds nothing to the analysis of the issues before us.

from time to time.[9] The interpretation of contract language is a question of law for the court to resolve. See *Thompson & Peck, Inc.* v. *Harbor Marine Contracting Corp.*, 203 Conn. 123, 131, 523 A.2d 1266 (1987).

If the provision has the first meaning, namely, that the merit system authorized by the CBA is that system in effect on July 1, 2016, when the CBA was signed, then that merit system was reflected in Ordinance 896 which was publically adopted several months before the CBA was signed, and which provided that (i) the examination could be open competitive **or** promotional, (ii) the **administrative assistant may adopt** or authorize the use of **any procedures** as deemed appropriate to assure a selection of employees on the basis of merit and qualifications, and (iii) that examinations **may include** written components. Thus, the city's merit system as it existed on July 1, 2016, did not absolutely require a written examination because the ordinance gave the administrative assistant power to adopt **any procedures** deemed appropriate and because the ordinance indicated that the process **may** contain a written component. A 1977 Ordinance provided: "Effective immediately *any* written and oral examinations *specified in the requirement sections* of all ordinances dealing with job descriptions will be weighed equally, 50% written and 50% oral."[10] (Emphasis added.) Shelton, Conn., Code of Ordinances, adopted March 14, 1977. This clearly meant that if the process included written and oral examinations, the two exams would be weighted equally. Accordingly, it is clear that the merit

[9] The board factually found that the merit system had been amended by the city on a multitude of occasions over the years, but that the record does not reflect the details of all changes to the merit system by city ordinances.

[10] Thus, this 1977 ordinance refers to "*any* written and oral examinations" "*specified in the requirement sections* of all ordinances." (Emphasis added.) Clearly this ordinance does not specify that a written examination is required. Instead, it indicates that, if a written examination is administered, it will be weighted equally with the oral examination.

system that existed on July 1, 2016, did not absolutely require a written examination, but instead only required that if the process contained both oral and written components, they would be weighted equally. The administrative assistant was provided with the discretion to choose the appropriate procedure.

If the CBA provision authorizes any merit system that the city maintains as amended from time to time, then the merit system relevant to this case was as described in the 2018 Ordinance, and that merit system did not require a written exam. Similar to Ordinance 896, the 2018 Ordinance provided the administrative assistant with discretion to determine the proper procedure. Thus, in either case the CBA authorizes the use of a merit system which allows for but does not require a written examination and allows the administrative assistant to choose the appropriate procedure.[11]

The board factually found that, in practice, from October, 1981, through February, 2018, the city's merit system was actually conducted in such a manner that it included a written examination weighted at 50 percent.

[11] Given the multitude of changes to the merit system over the years made by city ordinances, the court finds that the meaning of this CBA provision is that the city is authorized and required to use the city's merit system as that system is defined and modified by city ordinance from time to time, with the potential exception for negotiation required by § 7-474 (g) if changes are made that fit within the statutory exceptions. However, since no change was made to the relative weighting of examinations, no negotiation was required here. The court notes that the CBA defers to the city ordinances to define the merit system and does not prohibit the city from changing the merit system. This also makes sense since the merit system is used citywide across many unions and collective bargaining agreements. Further the various union's interests here are to ensure that promotions are provided in an evenhanded, fair and rational way. This interpretation is also consistent with § 7-474 (g), which exempts the merit based promotional process from mandatory negotiation except for the specific topics specified in the statute. However, regardless of which interpretation of this CBA provision is applied, the provision does not require the use of written examinations, thus no change was made in that regard.

Such a long established practice of an important aspect of employment could amount to a material term and condition of employment and the board found that it did. A material term and condition of employment generally cannot be altered without negotiation with the union. Further, the board found that the weighting of the written and oral examinations at 50 percent each was a condition that required negotiation to change under . . . § 7-474 (g).[12] Thus, the board found that the provision of a written examination weighted at 50 percent within the merit system could not be changed without negotiation with the union. However, § 7-474 (g) only required negotiation *if* a change was made to the relative weight to be applied. Here no change was made because the merit system allowed a process without a written examination. Further, if the CBA covers this term and condition of employment, then the city and the union have already negotiated over the matter and arrived at a result that is memorialized in the CBA. A failure to negotiate over a term of employment cannot be found where an express agreement between the parties that covers that term of employment is found in a collective bargaining agreement such as the CBA here. An employer does not have a duty to bargain over a term of employment that is covered by a provision of a collective bargaining agreement. See *Board of Education* v. *State Board of Labor Relations*, 299 Conn. 63, 74, 7 A.3d 371 (2010); see also *Norwich* v. *Norwich Fire Fighters*, 173 Conn. 210, 215–16, 377 A.2d 290 (1977). Collective bargaining agreements are the cornerstone of the relationship between the employer and labor. Collective bargaining agreements memorialize the bargaining that has occurred between the parties and establish each party's rights and obligations concerning the

[12] General Statutes § 7-474 (g) provides, inter alia, that the merit based promotional process is exempt from mandatory negotiation with a union except that changing the relative weight to be attached to methods of examination shall be subject to negotiation.

topics covered by the collective bargaining agreement. Thus, it is clear that the parties have the right and the obligation to conduct themselves in accordance with the terms of the collective bargaining agreement.

Clearly the CBA covers this matter. The CBA requires that promotions be made by the city in accordance with the city's merit system. As noted [previously], the merit system authorized by the CBA does, and did, not require a written examination within the process. Although the board factually found that, since 1981, the city utilized written examinations, on July 1, 2016, the union and the city negotiated and agreed that the merit system would be that system described in the city's ordinances.[13] Thus the union has had its negotiation concerning this term of employment and came to an agreement reflected in the CBA, and that agreement does not require a written examination.

The board found the city's reliance on the ordinances misplaced. The court respectfully disagrees. The CBA required the city to use its merit system. The merit system was defined by the ordinances. Thus the CBA, and therefore the union, agreed that the city should use its merit system as defined in the ordinances.

The board found that § 17.01 of the CBA must be read as a whole, and should be read consistent with § 29.03A. That may be so, but a corresponding reading does not change the court's interpretation of the CBA. Section 29.03A of the CBA refers to a written memorandum of understanding that is attached to the CBA. The memorandum of understanding establishes procedures to be followed to allow candidates to challenge results

[13] As noted [previously], regardless of the interpretation of this provision, the merit system as described by the ordinances did not require a written examination, whether we look to Ordinance 896, which was in effect when the CBA was signed, or the 2018 ordinance. Neither ordinance required a written examination.

on written tests given for promotional purposes. Thus the memorandum of understanding allows for individual challenges to scores on written examinations, if such written examinations are administered. The memorandum of understanding does not change the meaning of the CBA and does not require the administration of written examinations. Section 29.03[A] is not meaningless, it merely provides procedures that may be used in applicable circumstances.

The past practice of the city in using written examinations is entirely consistent with the CBA and the ordinances. Both the CBA and the ordinances allow for written examinations but do not require them. Reading the CBA as the union and the board do, results in a meaning that invalidates or undermines the plain meaning of the ordinances which were in existence when the CBA was signed. Since the CBA clearly uses the ordinances to define the merit system,[14] a reasonable reading of the CBA must be consistent with and not undermine the ordinances. Further, reading the CBA to allow but not require written examinations produces an interpretation that is consistent with the plain words of the CBA, including the attached memorandum of understanding, past practice, and the ordinances.

The union in this instance has not waived its right to negotiation,[15] it has had its negotiation when it agreed

[14] The CBA does not itself explicitly define or describe the city's merit system in any detail. The city defined its merit system through city ordinances.

[15] However, even if we look at waiver, the union signed the CBA referencing the city's merit system while knowing that Ordinance 896 had been enacted months before defining and explaining the city's merit system as a system that "may" include, but does not require, a written examination, and authorizing the administrative assistant to utilize any procedures deemed appropriate by the administrative assistant. This ordinance was adopted through the normal public legislative process, and the union either was aware of it or should have been. The union chose to adopt the CBA requiring the city to use its merit system without further definition or limit in the CBA. If the union was dissatisfied with Ordinance 896, it should have objected when

to the CBA, and the CBA does not mandate written examinations be part of the merit system. Accordingly, in passing the 2018 Ordinance, and in implementing the 2018 Ordinance in the promotion of the lieutenants, the city has not deprived the union of negotiation concerning this topic and has not violated MERA.[16]

Accordingly, the court determines that the plaintiff has established on appeal that the final decision of the board is (1) affected by error of law, and (2) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The court therefore respectfully sustains the appeal.

ORDER

The appeal is sustained. Judgment enters for the plaintiff. The city of Shelton has not, on the record before the court, violated MERA. Accordingly, the judgment and orders of the board are vacated.

---

the ordinance was enacted or dealt with the matter in the CBA. The city now is merely acting in accordance with its agreement.

[16] The board found that the CBA language did not reflect a mutual intent to authorize elimination of the written exam. However, the CBA is absolutely clear in requiring the city to use its merit system in evaluating promotions. The city's merit system, whether the system in place at the time that the last CBA was signed or the system as established from time to time by city ordinance, does not require a written examination. Thus, there was nothing to waive. Conduct in accordance with the CBA effective at the time does not require a waiver because the city had the right and the obligation to conduct itself in accordance with the CBA. Although the city did use a written examination for some time, the system that it was operating under allowed for but did not require the use of a written examination. Further the CBA signed in 2016, and applicable to all relevant periods here, specifies and confirms that the city is to use its merit system. This is exactly what the city did.

ROGALIS, LLC *v.* MICHELLE LEE VAZQUEZ ET AL.
(AC 44500)

Elgo, Moll and Suarez, Js.

Syllabus

The plaintiff sought, by way of summary process, immediate possession of certain residential property that it had acquired and that was occupied by the named defendant, V. The plaintiff alleged that it did not have a tenancy agreement with V. Although the state had a temporary moratorium on evictions per the governor's executive orders issued in response to the COVID-19 pandemic, the plaintiff alleged one of the recognized exceptions created by those orders, namely, that the plaintiff's sole member, R, had a bona fide intention to use the dwelling unit as his principal residence. During trial, R testified that the plaintiff purchased the premises in October, 2020, from S Co., and that he had a bona fide intention to use the premises as his principal residence. V, however, indicated that the plaintiff brought this action as a result of a loophole in a prior summary process action brought by S Co. against V and her estranged husband, D, and that she did not believe R had a bona fide intent to occupy the premises as his principal residence. In that prior summary process action, S Co., alleging that D was delinquent in his rental payments, commenced its action shortly after V had commenced a dissolution action against D. As a result, the trial court stayed S Co.'s action through the pendency of the dissolution action, which was still pending, and, therefore, temporarily removed S Co.'s right to maintain the summary process action in the absence of an order from the family court. S Co. thereafter conveyed the property to the plaintiff. Following trial on the plaintiff's summary process action, the court issued a memorandum of decision, concluding that the plaintiff had not established that its ownership rights to the premises included the right to maintain the summary process action. Thereafter, the trial court rendered judgment dismissing the action, from which the plaintiff appealed to this court. On appeal, the plaintiff claimed, inter alia, that the trial court erred by dismissing the summary process action on the basis of its posttrial consideration of extra-record evidence, namely, S Co.'s prior summary process action. Although S Co.'s action was eventually dismissed for dormancy, the trial court observed that S Co. could not as a matter of law have conveyed to the plaintiff the right to maintain a summary process action against V because, as a result of the stay, it did not have such a right of its own. *Held* that the trial court abused its discretion in taking judicial notice of S Co.'s summary process action without providing the parties an opportunity to address it either at trial or in a posttrial brief: although notice is not always required when a

court takes judicial notice, parties are entitled to receive notice and have an opportunity to be heard for matters susceptible of explanation or contradiction; moreover, the trial court relied on the facts of S Co.'s summary process action in concluding that the plaintiff did not have the right to bring the present action but did not give the parties an opportunity to address whether the stay that was entered in S Co.'s action prevented the current plaintiff from pursuing its own action against V; accordingly, the judgment was reversed and a new trial ordered.

Submitted on briefs September 15, 2021—officially released February 8, 2022

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Fairfield, Housing Session at Bridgeport, and tried to the court, *Spader*, *J.*; judgment of dismissal, from which the plaintiff appealed to this court. *Reversed*; *new trial.*

Jonathan J. Klein, for the appellant (plaintiff).

Marissa Vicario and *Nilda R. Havrilla*, for the appellee (named defendant).

Opinion

SUAREZ, J. The plaintiff, Rogalis, LLC, appeals from the judgment of the trial court dismissing its summary process action against the named defendant, Michelle Lee Vazquez.[1] On appeal, the plaintiff claims that the trial court erred by (1) holding that the plaintiff did not acquire from its predecessor in title, pursuant to a quitclaim deed, the right to evict the defendant, (2) dismissing the summary process action on the ground that the plaintiff's sole member did not have the bona fide intention to use the dwelling as his principal residence, and (3) dismissing the summary process action on the basis of the court's posttrial consideration of

[1] The plaintiff also named John Doe I, John Doe II, John Doe III, Jane Doe I, Jane Doe II, and Jane Doe III as defendants in this action. The plaintiff later withdrew the action as to these defendants. We refer to Vazquez as the defendant in this opinion.

extra-record evidence, namely, a prior summary process action brought by the plaintiff's predecessor in title against the defendant and her estranged husband. We conclude that the trial court abused its discretion in taking judicial notice of the prior summary process action without providing the parties an opportunity to address it either at trial or in a posttrial brief.[2] We, therefore, reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. By complaint dated October 30, 2020, the plaintiff commenced this summary process action seeking immediate possession of the premises located at 1335 James Farm Road in Stratford (premises). The plaintiff alleged that it had purchased the premises on or about October 7, 2020, and, therefore, had become the landlord of the premises. The plaintiff further alleged that the defendant was in possession of the premises, that the plaintiff and the defendant never had an agreement as to monetary compensation for the premises, and that it was the plaintiff's "bona fide intention to use the dwelling unit as the landlord's principal residence. (No tenancy agreement between the parties.)" On October 19, 2020, prior to the commencement of the summary process action, the plaintiff had served a notice to quit on the defendant demanding that she vacate the premises on or before October 25, 2020.

On November 6, 2020, the self-represented defendant filed an answer, admitting the allegations of the plaintiff's complaint except the allegation that it was the landlord's bona fide intention to use the dwelling as the landlord's principal residence. As to this allegation, the defendant responded that she did not know.[3] A

[2] Because our resolution of this claim is dispositive of the appeal, it is unnecessary for us to consider the plaintiff's remaining claims.

[3] The defendant also disagreed with the allegation that the plaintiff did not know the identity of John Doe I, John Doe II, John Doe III, Jane Doe I, Jane Doe II, and Jane Doe III. As stated in footnote 1 of this opinion, however, this action was withdrawn as to these defendants.

trial took place before the court on January 13, 2021. Following trial, the court issued a memorandum of decision in which it concluded that the plaintiff had not established that its ownership rights to the premises included the right to maintain this action. The court thereafter rendered judgment dismissing the summary process action. The plaintiff then filed the present appeal.

On appeal, the plaintiff claims, inter alia, that the trial court erred by dismissing this action on the basis of its posttrial consideration of extra-record evidence, namely, a prior summary process action brought by the former owner of the premises, Success, Inc., against the defendant and her estranged husband, Dahill Donofrio. This extra-record evidence reflected that Success, Inc., had commenced the prior action shortly after the defendant had commenced a dissolution action against Donofrio. The trial court had stayed the prior action through the pendency of the defendant's dissolution action, which was still pending. Thereafter, Success, Inc., conveyed its rights in the premises to the plaintiff. Although the court noted that the prior action was eventually dismissed for dormancy, it observed that Success, Inc., could not as a matter of law have conveyed to the plaintiff the right to maintain a summary process action against the defendant because, as a result of the stay, it did not have such a right of its own.

As we explain in more detail later in this opinion, the court expressly relied on the prior summary process action in determining that the plaintiff did not have the right to maintain the present summary process action against the defendant. The defendant contends that the trial court properly took judicial notice of the prior summary process action. We conclude that the trial court abused its discretion in taking judicial notice of the prior summary process action without providing

the parties an opportunity to address it either at trial or in a posttrial brief.

Before addressing the merits of the plaintiff's claim, we briefly set forth the legal basis pursuant to which the plaintiff brought this summary process action. On April 10, 2020, Governor Ned Lamont issued Executive Order No. 7X, which modified General Statutes § 47a-23 by placing a moratorium on the issuance of notices to quit and the commencement of summary process actions through June 30, 2020. This executive order provided, in part, that "minimizing evictions during this public health period is critical to controlling and reducing the spread of COVID-19 by allowing all residents to stay home or at their place of residence . . . ." Executive Order No. 7X (April 10, 2020). An exception to the moratorium was for notices to quit and summary process actions brought on the basis of serious nuisance as defined in General Statutes § 47a-15. Executive Order No. 7DDD, issued on June 29, 2020, created another exception to the moratorium "for nonpayment of rent due on or prior to February 29, 2020 . . . ." Executive Order No. 7OOO, issued on August 21, 2020, created an exception to the moratorium "for a bona fide intention by the landlord to use such dwelling unit as [the] landlord's principal residence" provided that the notice to quit is not delivered during the term of any existing rental agreement. The present action was brought pursuant to Executive Order No. 7OOO.

We now set forth the following additional facts that are necessary for the resolution of the plaintiff's claim. Prior to trial, the plaintiff filed the affidavit of Joseph Rogalis, the sole member of the plaintiff. In the affidavit, Rogalis averred, inter alia, that the plaintiff purchased the subject premises on October 7, 2020, and that he had a bona fide intent to use the premises as his principal residence. Rogalis further averred that his mother lived in Oxford and his father lived in Prospect and it was

his intention to relocate to Stratford so that he could live in close proximity to his parents and care for them. The plaintiff also filed a certified copy of a quitclaim deed recorded on October 7, 2020, pursuant to which the plaintiff acquired the premises from Success, Inc. "for One Dollar ($1.00) and other valuable consideration . . . ." This deed was signed by Gus Curcio, Sr., the president of Success, Inc.

At trial, Rogalis testified, consistent with his affidavit, that the plaintiff purchased the premises on or about October 7, 2020, with a bona fide intent that he would use the premises as his principal residence. Rogalis testified that he was a resident of Tavares, Florida and was relocating in order to assist in the health care of his mother, who lived in Oxford. In response, the defendant indicated that the plaintiff brought this action as a result of a "loophole" in a prior judgment, and that she did not believe that Rogalis had a bona fide intent to occupy the premises as his principal residence.[4]

[4] The following colloquy between the court, the plaintiff's counsel, and the defendant occurred at trial:

"The Court: Ms. Vazquez, what do you want the court to know about this action?

"The Defendant: Well, on October 7th, there was actually a deposition on Gus Curcio in which that's when I found out–

"[The Plaintiff's Counsel]: Objection, Your Honor. Relevance.

"The Court: Well, he's the grantor on the deed that you presented to the court. So, I'll hear this.

"[The Plaintiff's Counsel]: Thank you, Your Honor.

"The Defendant: Thank you. So, on October 7th, it was a deposition for Gus Curcio in which that's when he informed my lawyer and myself that he sold the property that day. I just find that funny. He's upset with the deposition and the fact that you allowed me to stay there until the divorce is final. So, my thing is they didn't like the ruling, so they had to find a loophole–

"[The Plaintiff's Counsel]: I'm going to object again, Your Honor. Who's they? I don't know who she's referring to as they.

"The Defendant: Gus Curcio, Success, Inc., and Dahill Donofrio.

"[The Plaintiff's Counsel]: I'm going to object again because of relevance, Your Honor.

"The Court: It's relevant because again they're the grantors of this property to the . . . plaintiff.

In its memorandum of decision, the court stated that, "[f]ollowing the conclusion of the trial, the court pieced together what the defendant was referring to as a 'loophole.' While the court did not recognize it until considering the case afterwards, the defendant had been a participant in previous matters before it. Specifically, in the matter of *Success*, *Inc.* v. *Donofrio*, Superior Court, judicial district of Fairfield, Housing Session at Bridgeport, Docket No. CV-19-6008242-S, the court had conducted a trial and, on January 10, 2020, entered a stay of proceedings through the pendency of the defendant's divorce matter . . . . In the *Donofrio* case, the previous landlord testified that the defendant's ex-husband was delinquent in his rental payments on this very [premises]." The court further noted that the previous case had been dismissed for dormancy, but the divorce was still pending and was scheduled for trial in the coming months.

In its decision, the court stated that "[c]ertainly, the court, when entering that stay, could not have anticipated that the divorce matter would still be pending a year later. The pandemic's impact on court dockets has created many challenges. This court certainly believes that there does come a time when possession must be returned to the property owner absent rental or use

"The Defendant: Thank you. So, what happens is that I believe–what happened is they didn't like the judgment, so they found a loophole to sell the property to a friend. The property was never listed. He lives in Florida.

"[The Plaintiff's Counsel]: Objection, Your Honor. This is all out of scope of her pleadings.

"The Court: But it's not out of the scope of what case you're trying to put forward, counsel, which is a bona fide intent of this individual to occupy this premises as his primary residence. So, it's a defense to the cause of action."

The defendant later testified that "the only thing that makes sense is they sell the house to a friend so that they can put a new eviction in to get me out sooner because now it's a totally different person instead of Gus Curcio, Success, Inc., and Dahill Donofrio."

and occupancy payments by the defendant. That time probably has come and would have been considered by this court in an honest application before it to terminate the stay. Instead, the plaintiff has come before this court (with the same attorney who handled the prior matter) without disclosing this prior case or the court's ruling in it at trial."

The court further stated that "[the plaintiff] could only obtain through a quitclaim deed from Success, Inc., rights that were still in Success, Inc.'s 'bundle of rights' at the time of conveyance. The court, in *Success, Inc.* v. *Donofrio*, supra, Superior Court, Docket No. CV-19-6008242-S, temporarily removed the right to maintain a summary process action absent order from the Bridgeport family court from Success, Inc.'s 'bundle of rights' it was able to convey. A conveyance of the property to another owner does not create additional rights that did not exist before the conveyance. Success, Inc., had no ability, absent an additional court order, to maintain a summary process action against this defendant. That right does not magically rematerialize if an action is brought by a new plaintiff."

According to the plaintiff, the court's dismissal of this action was predicated on its belief that the quitclaim deed from Success, Inc., to the plaintiff did not confer on the plaintiff the right to evict the defendant. The plaintiff contends that the court's conclusion was "solely the product of the trial court having considered extra-record evidence, which it sought out after the close of the evidence, namely, that a previous summary process action brought by the plaintiff's grantor, in which the defendant and her estranged husband were both defendants, [had] been interlocutorily stayed at one point before it was dismissed for dormancy." According to the plaintiff, the trial court should not have considered that extra-record evidence without affording the plaintiff an opportunity to address it at

trial or in a posttrial brief. The defendant contends, in response, that the trial court properly took judicial notice of the prior summary process action. We conclude that the court abused its discretion in taking judicial notice of the prior summary process action without providing the parties the opportunity to address it either at trial or in a supplemental brief.

In considering this claim, we note that the trial court did not expressly characterize its reliance on the facts concerning the prior summary process action as it having taken "judicial notice" of those facts. In its decision, however, the court discussed the prior summary process action and attached a copy of the order staying that action pending the defendant's divorce matter. As " '[t]here is no question that the trial court may take judicial notice of the file in another case, whether or not the other case is between the same parties' "; *Drabik* v. *East Lyme*, 234 Conn. 390, 398, 662 A.2d 118 (1995); it appears that the court took judicial notice of the prior summary process action. See *Ferraro* v. *Ferraro*, 168 Conn. App. 723, 731–33, 147 A.3d 188 (2016) (court did not indicate, in its memorandum of decision or articulation, that it had taken judicial notice of supplemental information in calculating defendant's net income, but if it did take judicial notice of certain facts, it should have provided parties with opportunity to be heard).

"A trial court's determination as to whether to take judicial notice is essentially an evidentiary ruling, subject to an abuse of discretion standard of review. . . . In order to establish reversible error, the [plaintiff] must prove both an abuse of discretion and a harm that resulted from such abuse. . . . In reviewing a trial court's evidentiary ruling, the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently . . . . Rather, our inquiry is limited to whether the trial court's

ruling was arbitrary or unreasonable." (Internal quotation marks omitted.) *Scalora* v. *Scalora*, 189 Conn. App. 703, 713, 209 A.3d 1 (2019).

"Notice to the parties is not always required when a court takes judicial notice." *Moore* v. *Moore*, 173 Conn. 120, 121, 376 A.2d 1085 (1977). "The court may take judicial notice without a request of a party to do so. Parties are entitled to receive notice and have an opportunity to be heard for matters susceptible of explanation or contradiction, but not for matters of established fact, the accuracy of which cannot be questioned." Conn. Code Evid. § 2-2 (b). "Even when a fact . . . is not open to argument, it may be the better practice to give the parties an opportunity to be heard." *Moore* v. *Moore*, supra, 122; see also E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 2.6.3, p. 112 ("'[b]etter practice,' if not principles of due process, clearly favors an opportunity to be heard on any matter to be noticed, including such issues as the 'noticeability' of the matter, its 'susceptibility' to explanation or contradiction, the 'authoritativeness' of the sources advanced in support of the proposition, and the proper use of the matter in the case at hand").

In concluding that the plaintiff did not have the right to bring the present summary process action, the court relied on the facts of the prior summary process action. The court, however, did not give the parties an opportunity to address whether the stay that was entered in the prior summary process action prevented the current plaintiff from pursuing its own action against the defendant. Even assuming that the stay entered in the prior action was binding on the plaintiff, the court did not give the parties the opportunity to address whether the stay was still in effect in light of the fact that the prior action had been dismissed for dormancy. Under these circumstances, we conclude that the court abused its discretion in taking judicial notice of the prior summary

process action without affording the parties the opportunity at trial or in a posttrial brief to address its impact. We likewise conclude that the proper remedy is to reverse the judgment and remand the case for a new trial.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

LUCKY 13 INDUSTRIES, LLC *v.* COMMISSIONER OF MOTOR VEHICLES
(AC 43317)

Cradle, Clark and Flynn, Js.

Syllabus

The plaintiff, a licensed used car dealer and repairer, appealed to this court from the judgment of the trial court dismissing its administrative appeal from the decision of the defendant Commissioner of Motor Vehicles concluding that the plaintiff had charged an illegal gate fee for the release of a vehicle following a nonconsensual tow to its place of business. The plaintiff towed the vehicle from the scene of an accident to its storage yard at the request of a police officer. A Co., the vehicle's insurer, hired C Co., a salvage company, to retrieve the vehicle. Before C Co. had dispatched a driver to do so, the plaintiff informed C Co. of the total towing and storage charges, which included a $93.59 fee to move the vehicle out of the storage yard and to position it for loading. C Co. directed T Co., a tow operator, to retrieve the vehicle on its behalf. When T Co.'s driver arrived at the plaintiff's place of business, the plaintiff provided him with a form entitled "Consensual Tow Form," which stated, inter alia, that, although T Co. could obtain the vehicle without paying a fee if the driver agreed to wait for a reasonable amount of time following his request for its release, T Co. requested that the plaintiff immediately release the vehicle. The driver signed the form, and the plaintiff released the vehicle to him. A Co. then filed a complaint with the Department of Motor Vehicles, alleging that the $93.59 charge was an illegal gate fee. Following a hearing, the commissioner determined that the tow at issue was nonconsensual and that the fee was charged in violation of the applicable statute (§ 14-66 (a) (3)) and regulation (§ 14-63-36c (a)). The plaintiff was ordered to pay $93.59 in restitution to A Co. and a $1000 civil penalty to the department. *Held*:

1. This court declined to review the plaintiff's unpreserved claim that federal law preempted any state regulations that purported to prohibit the fee that it charged because such fee was paid pursuant to a voluntary agreement for an expedited service, which constituted a consensual tow for purposes of federal law: the plaintiff did not raise a federal preemption claim during the administrative proceedings before the department, and, as a result, the department never ruled on such claim; moreover, the plaintiff failed to raise a preemption claim in its complaint on appeal to the trial court and, instead, raised the claim for the first time in its pretrial brief to the trial court; furthermore, the trial court did not address the argument in its ruling dismissing the administrative appeal, and the plaintiff did not seek an articulation from the trial court.
2. The trial court properly decided that there was substantial evidence to support the commissioner's determination that the plaintiff charged an illegal fee for the release of the vehicle and that the commissioner's decision was not contrary to law: it was undisputed that the plaintiff performed a nonconsensual tow when it transported the disabled vehicle from the scene of the accident to its place of business because the tow was performed at the request of a police officer, and the agreement to provide a more expeditious retrieval of the vehicle from the plaintiff's storage yard did not transform the nonconsensual tow into a consensual one; moreover, the applicable regulations (§§ 14-63-36b (2) (G) and 14-63-36c (e)) unambiguously provide that services related to the release of a vehicle following a nonconsensual tow are included in the tow charge and expressly prohibit wreckers from charging additional fees for the release of a vehicle; furthermore, although § 14-63-36b (4) of the regulations permits licensed wreckers to charge additional fees for exceptional services that are reasonable and necessary for the transporting of a vehicle, the expedited service at issue did not qualify as such an exceptional service; accordingly, pursuant to the applicable regulations and *Connecticut Motor Cars* v. *Commissioner of Motor Vehicles* (300 Conn. 617), the plaintiff was bound by the rates set by the commissioner and was prohibited from charging a gate fee for the release of the vehicle.
3. The trial court properly determined that the contract executed by the plaintiff and T Co. for expedited services was void as against public policy: the regulations governing nonconsensual tows were implemented to protect individuals whose vehicles had been towed without their consent from exorbitant towing and storage fees through the establishment of reasonable rates for the towing, transporting and storing of motor vehicles that fairly compensate wreckers for their services; moreover, the commissioner promulgated regulations to prohibit wreckers from charging an additional fee for the release of a vehicle incident to a nonconsensual tow because to allow wreckers to set their own rates for such releases would undermine the regulations that establish rates for the towing, transporting and storing of motor vehicles; furthermore,

enforcing an agreement that purported to authorize the plaintiff to charge a fee for the release of a vehicle following a nonconsensual tow plainly would erode the public policy reflected in the regulatory scheme and would encourage wreckers to subvert the consumer protections underlying the regulations.

Argued November 16, 2021—officially released February 8, 2022

Procedural History

Appeal from the decision of the defendant finding that the plaintiff had charged an unlawful gate fee for the release of a certain vehicle and ordering the plaintiff to pay restitution and a civil penalty for such charge, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Hon. Henry S. Cohn*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Thomas J. Weihing, with whom, on the brief, was *John T. Bochanis*, for the appellant (plaintiff).

Anthony C. Famiglietti, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (defendant).

Opinion

CLARK, J. This administrative appeal arises from a complaint filed with the Department of Motor Vehicles (department), alleging that the plaintiff, Lucky 13 Industries, LLC, doing business as Midnight Auto, charged an illegal "gate fee" for the release of a vehicle following a nonconsensual tow to its place of business.[1] The plaintiff appeals from the judgment of the trial court dismissing its appeal from the decision of the defendant, the Commissioner of Motor Vehicles (commissioner), concluding that the plaintiff had charged an unlawful gate

[1] The term "gate fee" refers to a "fee for the labor and equipment needed to move a wrecked or disabled vehicle from the secured storage area to the designated vehicle retrieval area." *Connecticut Motor Cars* v. *Commissioner of Motor Vehicles*, 300 Conn. 617, 623, 15 A.3d 1063 (2011).

fee and ordering the plaintiff to make restitution to the complainant, Amica Insurance Company (Amica), and to pay a civil penalty to the department. On appeal to this court, the plaintiff claims that federal law preempts state regulation of gate fees charged pursuant to a voluntary agreement. The plaintiff additionally claims that the trial court improperly concluded that (1) the tow at issue was nonconsensual notwithstanding that the plaintiff and Amica's subcontractor executed a contract providing that the plaintiff would perform an "expedited service" when retrieving the vehicle for release and (2) the contract was void as against public policy. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of the plaintiff's claims. The plaintiff is a licensed used car dealer and repairer. On February 16, 2017, at the request of the Stratford Police Department, the plaintiff towed a vehicle that had been involved in a motor vehicle accident to its place of business. The vehicle was insured by Amica. Thereafter, Amica hired Copart Auto Auctions (Copart), a salvage company, to retrieve the vehicle from the plaintiff's storage yard. On February 23, 2017, Copart contacted the plaintiff to make arrangements to retrieve the vehicle. The plaintiff informed Copart that the towing and storage charges totaled $765.72.[2] The billed amount included a $93.59 fee, which was described in a work order as follows: "Driver could not maneuver truck in yard, request vehicle to be moved out of storage yard so vehicle could be loaded onto truck. Hook-up to vehicle—move out of storage yard—position for loading." The plaintiff charged this fee before Copart had dispatched a driver to retrieve the vehicle. Copart directed Anthony's High Tech (Tech), a tow operator and repair

[2] The final bill totaled $795.50, which included an additional daily storage charge.

shop, to retrieve the vehicle on its behalf the following day.

On February 24, 2017, a Tech driver arrived at the plaintiff's place of business. The plaintiff provided the driver with a form titled "Consensual Tow Form" (contract), which stated in relevant part that "[Tech], as a [r]epresentative of Copart is hereby advised that [it] can obtain the subject motor vehicle . . . without paying any fee or charge provided all documentation and authorization [are] in order. [Tech] agrees to wait for said vehicle for a reasonable time after the request for release of the subject vehicle. Notwithstanding the foregoing, [Tech] hereby request[s] that [the plaintiff] immediately provide an employee to assist in the removal, towing and securing of the subject vehicle for transportation . . . ."[3] The Tech driver signed the form, and the plaintiff subsequently retrieved the vehicle from its storage area and released the vehicle to the Tech driver.

On May 19, 2017, the department received a complaint filed by Amica, alleging that the plaintiff had charged a $93.59 gate fee for the release of a disabled vehicle belonging to its insured. On January 15, 2019, following a three day evidentiary hearing, the hearing officer issued a memorandum of decision, finding that the tow at issue was a nonconsensual tow because it was performed at the request of the police[4] and that the fee was therefore charged in violation of General Statutes

[3] Keith Vail, the plaintiff's owner, testified that the $93.59 fee encompassed both a charge for retrieving the vehicle from the storage yard and for immediately releasing the vehicle to the Tech driver when the driver arrived at the plaintiff's place of business. Vail testified that the fee was "all one fee . . . a yard/gate fee."

[4] General Statutes § 14-66 (h) defines a nonconsensual tow as the "towing or transporting of a motor vehicle in accordance with the provisions of section 14-145 or *for which arrangements are made by order of a law enforcement officer* or traffic authority, as defined in section 14-297." (Emphasis added.) See also Regs., Conn. State Agencies § 14-63-34 (b).

§ 14-66 (a) (3) and § 14-63-36c (a) of the Regulations of Connecticut State Agencies.[5] The plaintiff was ordered to pay $93.59 in restitution to Amica and a $1000 civil penalty to the department.

The plaintiff appealed to the trial court, which also concluded that the tow at issue was a nonconsensual tow and that, in accordance with our Supreme Court's holding in *Connecticut Motor Cars* v. *Commissioner of Motor Vehicles*, 300 Conn. 617, 15 A.3d 1063 (2011), the department's hearing officer correctly determined that the plaintiff had charged an illegal gate fee for the release of a vehicle following a nonconsensual tow. The court also rejected the plaintiff's claim that the plaintiff and Amica's agent, Tech, had executed a valid and enforceable contract to perform a consensual tow because the contract violated state law and was therefore void as against public policy. Accordingly, the court dismissed the plaintiff's appeal. This appeal followed.

We begin by setting forth the standard of review and legal principles that govern our resolution of the plaintiff's claims. "[J]udicial review of the commissioner's action is governed by the Uniform Administrative Procedure Act [(UAPA), General Statutes §§ 4-166 through 4-189], and the scope of that review is very restricted. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable.

[5] General Statutes § 14-66 (a) (3) provides in relevant part: "With respect to the nonconsensual towing or transporting and the storage of motor vehicles, no such person, firm or corporation shall charge more than the rates and charges published by the commissioner. . . ."

Section 14-63-36c (a) of the Regulations of Connecticut State Agencies provides in relevant part: "[A] licensed wrecker service shall not charge the owner or operator of a motor vehicle . . . for nonconsensual towing or transporting services as defined in section 14-63-34, any fees which are in excess of the tow charge."

. . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Citation omitted; internal quotation marks omitted.) *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000).

"The substantial evidence rule governs judicial review of administrative fact-finding under the UAPA. [See] General Statutes § 4-183 (j) (5) and (6). An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . . It is fundamental that a plaintiff has the burden of proving that the commissioner, on the facts before [the commissioner], acted contrary to law and in abuse of [the commissioner's] discretion . . . ." (Internal quotation marks omitted.) *Jim's Auto Body* v. *Commissioner of Motor Vehicles*, 285 Conn. 794, 817, 942 A.2d 305 (2008).

"Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of

law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, 310 Conn. 276, 281–82, 77 A.3d 121 (2013).

I

The plaintiff first claims that federal law preempts any state regulations purporting to prohibit the fee it charged in this case because that fee was paid pursuant to a voluntary agreement for an "expedited service," which constituted a *consensual* tow for purposes of federal law. For the reasons that follow, we decline to review this claim because the plaintiff failed to preserve it.

"It is well known that an appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level." (Internal quotation marks omitted.) *Towbin* v. *Board of Examiners of Psychologists*, 71 Conn. App. 153, 175, 801 A.2d 851, cert. denied, 262 Conn. 908, 810 A.2d 277 (2002); see also Practice Book § 60-5 ("court shall not be bound to consider a claim unless it was distinctly raised at the trial"). "For us [t]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge. . . . We have repeatedly indicated our disfavor with the failure, whether because of a mistake of law, inattention or design, to object to errors occurring in the course of a trial until it is too late for them to be corrected, and thereafter, if the outcome of the trial proves unsatisfactory, with the assignment of such errors as grounds of appeal. . . . This rule applies to appeals from administrative proceedings as well." (Citation omitted; internal quotation marks omitted.) *Ferraro* v. *Ridgefield*

European Motors, Inc., 313 Conn. 735, 759, 99 A.3d 1114 (2014). "A party to an administrative proceeding cannot be allowed to participate fully at hearings and then, on appeal, raise claims that were not asserted before the [agency]." *Dragan* v. *Connecticut Medical Examining Board*, 223 Conn. 618, 632, 613 A.2d 739 (1992).

Our careful review of the record reveals that the plaintiff did not raise a federal preemption claim during the administrative proceedings before the department and, as a result, the department never ruled on that claim. In addition, on appeal to the trial court, the plaintiff did not raise a preemption claim in its complaint. See *Dickman* v. *Office of State Ethics, Citizen's Ethics Advisory Board*, 140 Conn. App. 754, 759–60, 60 A.3d 297 (purpose of pleadings is to apprise court and opposing counsel of issues to be tried and judgment should conform to issues and prayer for relief set forth in pleadings), cert. denied, 308 Conn. 934, 66 A.3d 497 (2013). Instead, the plaintiff raised the preemption claim for the first time in its pretrial brief to the trial court. The commissioner did not respond to that argument in her brief and the trial court did not address it in its ruling dismissing the plaintiff's administrative appeal. To the extent the plaintiff believed that the claim had been properly raised and that the court had failed to address it, the plaintiff could have, but failed, to seek an articulation from the court. It was the plaintiff's responsibility to do so. See Practice Book § 61-10 (a) (it is appellant's responsibility to provide adequate record for review); *Murphy* v. *Zoning Board of Appeals*, 86 Conn. App. 147, 159, 860 A.2d 764 (2004) (motion for articulation is proper procedure by which appellant may ask trial court to address matter overlooked in its decision), cert. denied, 273 Conn. 910, 870 A.2d 1080

(2005).[6] Because the plaintiff failed to preserve its preemption claim, we decline to review that claim in this appeal.[7]

II

We next address whether the court properly concluded that the plaintiff charged an unauthorized fee for a nonconsensual tow. On appeal, the plaintiff does not dispute that the towing of the vehicle from the scene of the accident to the plaintiff's yard was a nonconsensual tow because it was performed at the request of the police. Nevertheless, the plaintiff argues that, because Tech, acting within its capacity as Amica's agent, agreed to pay the plaintiff an additional fee for the immediate retrieval of the vehicle from the plaintiff's storage yard rather than wait a reasonable time at no extra charge, the plaintiff performed a *consensual* tow when it removed the vehicle from its storage yard and brought it to the designated retrieval area. Stated differently, the plaintiff claims that the execution of a contract between the plaintiff and Amica's agent for an optional, "expedited service" when releasing the vehicle transformed the nonconsensual tow into a consensual tow and that the transaction was therefore exempt in part from the regulations governing nonconsensual tows. We are not persuaded.

[6] Because the plaintiff did not raise the preemption claim during the administrative proceedings or plead that claim in its complaint, we decline to exercise our authority to order an articulation sua sponte pursuant to Practice Book § 61-10 (b).

[7] We note that "[f]ederal preemption of a state law . . . does not necessarily implicate the court's subject matter jurisdiction" and, therefore, may be waived. *Mullin* v. *Guidant Corp.*, 114 Conn. App. 279, 283, 970 A.2d 733, cert. denied, 292 Conn. 921, 974 A.2d 722 (2009); id. (trial court improperly treated party's motion for summary judgment asserting federal preemption defense as motion to dismiss for lack of subject matter jurisdiction); see also *Peters* v. *Senman*, 193 Conn. App. 766, 782–83, 220 A.3d 114 (2019) (declining to address preemption claim that was not adequately briefed), cert. denied, 334 Conn. 924, 223 A.3d 380 (2020).

Pursuant to § 14-66 (a) (2), which provides in relevant part that "[t]he commissioner shall establish and publish a schedule of uniform rates and charges for the nonconsensual towing and transporting . . . and for the storage of motor vehicles," the commissioner has promulgated §§ 14-63-34 through 14-63-37b of the Regulations of Connecticut State Agencies. These regulations set forth, inter alia, the permissible charges that licensed wreckers may levy in relation to nonconsensual towing operations.[8] Our Supreme Court has held that, under the plain language of the regulations, wreckers are not permitted to charge a gate fee for the release of a vehicle that was towed without the owner's consent. *Connecticut Motor Cars* v. *Commissioner of Motor Vehicles*, supra, 300 Conn. 623.

In *Connecticut Motor Cars*, Allstate Insurance Company (Allstate) had filed two complaints with the department alleging that a licensed motor vehicle dealer and repairer improperly charged a gate fee for the release of disabled vehicles belonging to its insureds. Id., 619–20. At the evidentiary hearing, the licensee claimed that it routinely charged a gate fee for the labor and equipment used to move a disabled vehicle from its secured storage area to the retrieval area because such a fee was permitted pursuant to § 14-63-36c (c) of the Regulations of Connecticut State Agencies. Id. Section 14-63-36c (c) provides in relevant part that "[a] licensed wrecker service may charge additional fees . . . for services not included in the tow charge or hourly rate . . . ." The licensee contended that, when it moved a vehicle from its storage area to the retrieval area, it performed a service unrelated to the towing or storing of the vehicle and, therefore, had performed a

[8] General Statutes § 14-1 (109) defines " '[w]recker' " in relevant part as "a vehicle which is registered, designed, equipped and used for the purposes of towing or transporting wrecked or disabled motor vehicles for compensation . . . ."

service not included within the tow charge. *Connecticut Motor Cars* v. *Commissioner of Motor Vehicles*, supra, 300 Conn. 620.

Rejecting the licensee's claim, the commissioner concluded that the regulations make clear that services related to the release of a vehicle to an owner following a nonconsensual tow are included in a tow charge and that the licensee had therefore charged an unlawful gate fee. Id. The commissioner noted that § 14-63-36b (2) (G) of the Regulations of Connecticut State Agencies specifically provides that a tow charge shall include the "[*r*]*elease of the vehicle* to the owner . . . ."[9] (Emphasis added; internal quotation marks omitted.) Id. The commissioner further observed that § 14-63-36c (e) of the Regulations of Connecticut State Agencies "expressly prohibits additional fees for the release of a motor vehicle . . . ."[10] Id. Consequently, the plaintiff was ordered to make restitution to Allstate and to pay a civil penalty for violating § 14-66 (a) (3), which provides that, with respect to nonconsensual tows, wreckers may not charge more than the rates set by the commissioner. Id., 619 n.3, 620. The licensee appealed to the trial court, which dismissed the appeal, concluding that the commissioner did not abuse his discretion in determining that a gate fee is included in a tow charge. Id., 620–21.

The licensee appealed the court's judgment, and the case was transferred to our Supreme Court. Id., 619

[9] Section 14-63-36b (2) of the Regulations of Connecticut State Agencies provides in relevant part: " 'Tow charge' means the maximum amount determined by the commissioner that a licensed wrecker service may charge the owner or operator of a motor vehicle . . . for nonconsensual towing or transporting of a motor vehicle . . . . Except as otherwise specifically provided, the tow charge shall include . . . (G) Release of the vehicle to the owner or person otherwise entitled to possession of the vehicle upon presentation of appropriate credentials."

[10] Section 14-63-36c (e) of the Regulations of Connecticut State Agencies provides: "No additional fee shall be charged by a licensed wrecker service for releasing a vehicle to its owner or a person legally entitled to its custody."

n.2. Our Supreme Court agreed with the commissioner's interpretation of the regulations and affirmed the trial court's judgment. Id., 622–23. It held that § 14-63-36b (2) of the regulations "incontrovertibly establishes that the term 'tow charge' encompasses all of the services rendered in the nonconsensual towing, transporting and *releasing* of a motor vehicle" and, therefore, wreckers are not permitted to charge a gate fee for nonconsensual tows. (Emphasis added.) Id., 623. The court further explained that, although § 14-63-36c (c) of the regulations permits additional fees for services not included in the tow charge, the tow charge "includes all of the services rendered in the [licensee's] gate fee . . . ." Id.

We conclude that the holding in *Connecticut Motor Cars* is squarely on point and is dispositive of the plaintiff's claim in the present appeal. As in *Connecticut Motor Cars*, the plaintiff charged a fee for the release of a vehicle following a nonconsensual tow to its place of business, which is expressly prohibited by the plain language of the regulations. Regs., Conn. State Agencies § 14-63-36c (e). It is undisputed that the plaintiff performed a nonconsensual tow from the accident site to its place of business because the tow was performed at the request of the police. See Regs., Conn. State Agencies § 14-63-34 (nonconsensual towing means "towing or transporting of a motor vehicle . . . for which arrangements are made by order of a law enforcement officer"). The plaintiff was therefore bound by the rates set by the commissioner and prohibited from charging a gate fee for the release of the vehicle to the owner or person entitled to take possession. See *Connecticut Motor Cars* v. *Commissioner of Motor Vehicles*, supra, 300 Conn. 623 ("only reasonable interpretation of the regulations is that a gate fee is not permitted").

The plaintiff attempts to distinguish *Connecticut Motor Cars*. It argues that, in the present case, Amica's

agent *consented* to pay an additional fee for the immediate release of the vehicle and that, by extension, the tow at issue was *consensual* and not governed by the regulations pertaining to nonconsensual tows. Thus, by the plaintiff's logic, although the tow from the scene of the accident to the plaintiff's place of business was a nonconsensual tow, because Amica's agent entered into a contract for an expedited retrieval service, the plaintiff performed a consensual tow from its secured storage area to the loading area. We disagree.

Although there may be limited circumstances in which a nonconsensual tow later becomes a consensual tow; see *Farmington Auto Park, LLC* v. *Progressive Auto Ins.*, No. CCC-2014-1032 (February 3, 2016) (decision of Department of Motor Vehicles) (nonconsensual tow became consensual tow when vehicle owner signed written authorizations permitting wrecker to commence repairs and store vehicle rather than seeking release of disabled vehicle); no such circumstances were present in this case. The regulations irrefutably establish that a " 'tow charge' encompasses all of the services rendered in the nonconsensual towing, transporting and releasing of a motor vehicle." *Connecticut Motor Cars* v. *Commissioner of Motor Vehicles*, supra, 300 Conn. 623. As a result, a nonconsensual tow generally commences at the request of a police officer and continues until the vehicle is released to the owner or person authorized to take possession. An agreement to provide a more expeditious retrieval of the disabled vehicle from the plaintiff's storage yard does not transform what began as a nonconsensual tow into a consensual tow.[11]

[11] Although Vail testified at the hearing that the $93.59 fee encompassed the charge for maneuvering the disabled vehicle from the storage yard to the retrieval area and for immediate service when retrieving the car; see footnote 3 of this opinion; on appeal, the plaintiff relies entirely on the execution of the contract to argue that the gate fee was permissible. We note that whether the gate fee was imposed for maneuvering the vehicle from the storage lot to the retrieval area, immediately retrieving the vehicle

The plaintiff contends that, because Amica's agent voluntarily agreed to pay a fee for immediate service rather than wait a reasonable time for the vehicle to be released at no charge, it was permitted to charge an additional fee. The regulations prohibiting gate fees, however, do not include an exception authorizing wreckers to charge such a fee if the owner or person authorized to take possession of the vehicle has consented to a fee for expedited service. Although the regulations include certain exceptions permitting a licensed wrecker to charge fees exceeding the commissioner's published rates, they do not authorize agreements to pay a gate fee.

Section 14-63-36c (c) of the regulations, for example, provides that a licensed wrecker may "charge additional fees for exceptional services, and for services not included in the tow charge or hourly rate, which are reasonable and necessary for the nonconsensual towing or transporting of a motor vehicle." As we have explained, however, the regulations unambiguously provide that services related to the release of a vehicle following a nonconsensual tow are included in the tow charge. Regs., Conn. State Agencies § 14-63-36b (2) (G); see also *Connecticut Motor Cars* v. *Commissioner of Motor Vehicles*, supra, 300 Conn. 622–23. The regulations also expressly prohibit wreckers from charging additional fees for the release of a vehicle to the owner or an authorized agent. Regs., Conn. State Agencies § 14-63-36c (e). Furthermore, an *expedited* service does not qualify as an *exceptional* service under the regulations, which define " 'exceptional services' " as "the use of special equipment such as cutting torches, air compressors and other equipment not generally

when the Tech driver arrived, or both, does not alter the outcome in this case. Regardless, the plaintiff was not permitted to charge an additional fee for services related to the release of a vehicle in connection with a nonconsensual tow.

required for nonconsensual towing or transporting services, at the scene of an accident." Regs., Conn. State Agencies § 14-63-36b (4). The plaintiff's alleged "expedited" retrieval of a vehicle from its storage yard when releasing the vehicle is clearly not encompassed within that definition.

We therefore conclude that the trial court properly decided that there was substantial evidence to support the commissioner's determination that the plaintiff charged an illegal fee for the release of a vehicle and that the commissioner's decision was not contrary to law.

III

The plaintiff's final claim is that the court improperly concluded that the contract between the plaintiff and Amica's agent was void as against public policy. The plaintiff argues that the contract is enforceable because the plaintiff and the Tech driver voluntarily executed a contract at "arm's length" that benefited all parties to the agreement.[12] The commissioner counters that the freedom to contract does not include the right to contravene state laws or public policy. We conclude that the contract is unenforceable because it is contrary to public policy.

"We begin our analysis of this claim by setting forth the standard of review governing a claim that a contract is unenforceable as a matter of public policy. Although it is well established that parties are free to contract for whatever terms on which they may agree . . . it is equally well established that contracts that violate public policy are unenforceable." (Internal quotation marks omitted.) *Emeritus Senior Living* v. *Lepore*, 183 Conn. App. 23, 30–31, 191 A.3d 212 (2018). "The question of [w]hether a contract is enforceable or illegal is a ques-

[12] We assume, without deciding, that the plaintiff and Amica's agent did form a contract when Amica's agent signed the "Consensual Tow Form."

tion . . . to be determined from all the facts and circumstances of each case. Similarly . . . the question [of] whether a contract is against public policy is [a] question of law dependent on the circumstances of the particular case . . . .'' (Internal quotation marks omitted.) *Carriage House I-Enfield Assn., Inc.* v. *Johnston*, 160 Conn. App. 226, 245–46, 124 A.3d 952 (2015). If a contract is contrary to public policy, that is, if it negates laws enacted for the common good, it is unenforceable. *Parente* v. *Pirozzoli*, 87 Conn. App. 235, 246, 866 A.2d 629 (2005); see also *12 Havemeyer Place Co., LLC* v. *Gordon*, 76 Conn. App. 377, 389, 820 A.2d 299 (''[c]ontractual rights arising from agreements are subject to the fair exercise of the power of the state to secure health, safety, comfort or the general welfare of the community''), cert. denied, 264 Conn. 919, 828 A.2d 618 (2003).

The regulations governing nonconsensual tows were implemented to protect individuals whose vehicles have been towed without their consent from exorbitant towing and storage fees. Without regulation, a wrecker taking possession of a vehicle pursuant to a request by the police could charge whatever price the wrecker saw fit and the owner of the vehicle would have little choice but to pay the fee demanded to recover possession of the vehicle. *City Line Sales & Service, Inc.* v. *Commissioner of Motor Vehicles*, Superior Court, judicial district of New Britain, Docket No. CV-18-6043756-S (January 15, 2020) (*City Line*). Our legislature sought to address the imbalance inherent in nonconsensual towing transactions by directing the commissioner to establish reasonable rates for the towing, transporting, and storing of motor vehicles that fairly compensate wreckers for their services. See General Statutes § 14-66 (a) (2) (uniform rates established by commissioner must be just and reasonable).

Pursuant to that delegated authority, the commissioner promulgated regulations that prohibit wreckers from charging an additional fee for the release of a vehicle incident to a nonconsensual tow; Regs., Conn. State Agencies §§ 14-63-36b (2) (G) and 14-63-36c (e); because it would simply make no sense to regulate the price of the towing itself but allow wreckers to set their own rates for the release of the vehicle. See, e.g., *Modzelewski's Towing & Recovery, Inc.* v. *Commissioner of Motor Vehicles*, 322 Conn. 20, 36, 139 A.3d 594 (2016) (pretowing recovery service and actual towing are inextricably linked such that it would be inconsistent with legislative intent if states were preempted from regulating pretowing recovery service with respect to nonconsensual tow), cert. denied, U.S. , 137 S. Ct. 1396, 197 L. Ed. 2d 554 (2017). Enforcing an agreement that purports to authorize the plaintiff to charge a fee for the release of a vehicle that has been towed without an owner's consent plainly erodes the public policy reflected in the regulatory scheme. Such agreements would permit wreckers to conduct their operations in a manner that encourages, if not compels, those seeking the release of a vehicle to pay an extra fee, thereby subverting the consumer protections underlying the regulations. A recent Superior Court case illustrates this problem.

In *City Line*, a tow operator retrieving a disabled vehicle from a wrecker's storage yard following a nonconsensual tow was presented with and signed the same form contract at issue in this appeal. *City Line Sales & Service, Inc.* v. *Commissioner of Motor Vehicles*, supra, Superior Court, Docket No. CV-18-6043756-S. In its decision, the trial court noted that there was evidence in the record establishing that tow operators assume that a wrecker that has taken possession of a disabled vehicle can make operators wait for hours, "an economically disadvantageous amount of time," before a vehicle

is released—unless the operator agrees to pay the gate fee. Id. There was also testimony establishing that the insurance company had no choice but to authorize its contractor to pay the gate fee for the release of the vehicle or to dispute the charge and face additional daily storage charges—a practice the court found coercive.[13] Id. Consequently, the court in *City Line* concluded that "it would be contrary to the public policy underlying the regulations to allow [wreckers] to circumvent the department's price regulations by obtaining 'consent' . . . under the circumstances inherent in a nonconsensual tow." Id.

The contract at issue in the present case would have the same effect. Because it would thwart the very public policy goals the regulations were designed to promote, we conclude that the trial court properly determined that the contract was void as against public policy.

The judgment is affirmed.

In this opinion the other judges concurred.

WAYNE MARGARUM, SR. *v.* DONUT DELIGHT, INC., ET AL.
(AC 43696)

Prescott, Cradle and DiPentima, Js.

Syllabus

The plaintiff, a business invitee of the defendants, sought to recover damages for personal injuries he sustained when he allegedly slipped and fell on

[13] At the evidentiary hearing in the present appeal, Amica's witness similarly testified that Amica had agreed to pay the plaintiff the full amount billed, although it disputed the gate fee charge, because, "[i]n order to pick a vehicle up and stop storage charges, the shop needs to be paid."

Additionally, the court in *City Line* flatly rejected the wrecker's claim that a gate fee for "expedited service" is voluntary because, like here, the gate fee was included in the billed amount *the day before* the tow operator arrived to retrieve the vehicle from the wrecker's storage yard. *City Line Sales & Service, Inc.* v. *Commissioner of Motor Vehicles*, supra, Superior Court, Docket No. CV-18-6043756-S. We highlight this point to illustrate the

an accumulation of ice on a sidewalk or parking area maintained and controlled by the defendants. The plaintiff thereafter withdrew his complaint as against the named defendant. Following a jury verdict and judgment in favor of the defendant S Co., the plaintiff appealed to this court. *Held* that the record was inadequate to review the plaintiff's claim that the trial court erred in denying his motion to set aside the verdict, the plaintiff having failed to order or otherwise provide this court with transcripts of the evidentiary portion of the trial proceedings in accordance with the applicable rules of practice (§§ 61-10 (a) and 63-8 (a)); moreover, this court declined to review the plaintiff's inadequately briefed claim that the court erred in denying his request for supplemental jury interrogatories and deemed the claim abandoned.

Argued October 21, 2021—officially released February 8, 2022

Procedural History

Action to recover damages for personal injuries sustained by the plaintiff as a result of the defendants' alleged negligence, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the action was withdrawn as against the named defendant; thereafter, the matter was tried to the jury before *Krumeich, J.*; subsequently, the court denied the plaintiff's motion to submit supplemental or amended jury interrogatories; verdict for the defendant Square Acre Realty, LLC; thereafter, the court denied the plaintiff's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court; subsequently, Arlene S. Margarum, executrix of the estate of Wayne Margarum, Sr., was substituted as the plaintiff. *Affirmed.*

Bruce J. Corrigan, Jr., for the appellant (substitute plaintiff).

Laura Pascale Zaino, with whom was *Jennifer L. Booker*, for the appellee (defendant Square Acre Realty, LLC).

inherent contradiction we find in the plaintiff characterizing a fee charged in advance as a voluntary fee for an "expedited" service.

Opinion

PER CURIAM. The original plaintiff, Wayne Margarum, Sr.,[1] who claimed that he fell and injured himself on an icy sidewalk while exiting a donut shop operated by Donut Delight, Inc. (Donut Delight), at premises owned by the defendant Square Acre Realty, LLC (Square Acre), appeals from the judgment of the trial court, rendered following a jury trial, in favor of the defendant.[2] The plaintiff claims that the court improperly (1) denied a motion to set aside the verdict returned by the jury because the verdict "shocks the conscience" and is "manifestly unjust and palpably against the evidence," and (2) denied a motion to submit supplemental or amended interrogatories to the jury after the jury initially reported that it was "deadlocked" in its attempt to answer jury interrogatories and was unable to reach a verdict. In addition to responding to the plaintiff's claims on their merits, the defendant argues that the plaintiff's failure to provide this court with the transcripts from the evidentiary portion of the trial precludes this court from reviewing the court's ruling on the motion to set aside the verdict and that the second claim is inadequately briefed. We agree with the defendant that the record is inadequate to review the plaintiff's first claim and that the plaintiff has inadequately

[1] During the pendency of the appeal, the original plaintiff died. The appeal was stayed pursuant to General Statutes § 52-599 until the executrix of the plaintiff's estate, Arlene S. Margarum, was substituted for the original plaintiff. We refer to substitute plaintiff herein as the plaintiff and to Wayne Margarum, Sr., as the original plaintiff.

[2] Donut Delight originally was also a named defendant in the underlying action, but it entered into a settlement agreement with the original plaintiff prior to trial, and he withdrew the complaint against it. Square Acre filed a third-party complaint for indemnification against Alert Security Plus, LLC (Alert Security), the company that allegedly provided snow removal services at the subject premises, and Alert Security filed counterclaims against Donut Delight and Square Acre. Prior to trial, however, Square Acre withdrew its third-party complaint, and Alert Security withdrew its counterclaims. Thus, all references to the defendant in this opinion are to Square Acre only.

briefed her claim regarding supplemental jury interrogatories. Accordingly, we decline to review the plaintiff's claims and affirm the judgment of the court.

The gravamen of the plaintiff's first claim is that the jury's factual finding, as reflected in its response to jury interrogatories, that the sidewalk in front of Donut Delight was not in a defective and unreasonably dangerous condition to business invitees such as the original plaintiff, was "palpably against the evidence" presented at trial and, thus, the court should have granted the original plaintiff's motion to set aside the jury's verdict. In order to properly address that claim, however, it is necessary to review all of the evidence, including relevant witness testimony, presented to the jury. See *Gagliano* v. *Advanced Specialty Care, P.C.*, 329 Conn. 745, 754, 189 A.3d 587 (2018) (appellate review of evidentiary soundness of jury verdict requires court to consider totality of evidence presented); *Rice* v. *Housing Authority*, 129 Conn. App. 614, 619, 20 A.3d 1270 (2011) (this court stated in appeal from denial of motion to set aside verdict that "we are unable to determine the merits of the plaintiff's claim without the benefit of the transcripts of the proceedings, there being no way in their absence for us to examine fully the evidence that was before the jury in this case").

The plaintiff failed to order or otherwise provide this court with transcripts of the evidentiary portion of the trial proceedings, thus rendering impossible any meaningful evaluation of the entirety of the evidence presented to the jury. The only transcripts provided by the plaintiff were of proceedings that occurred after the matter was submitted to the jury for deliberation, in which the court addressed questions posed by the jury and the original plaintiff's motion to submit supplemental or amended jury interrogatories. Practice Book § 61-10 (a) provides: "It is the responsibility of the appellant to provide an adequate record for review. The appellant

shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal." Practice Book § 63-8 (a) provides in relevant part that "the appellant shall . . . order . . . from an official court reporter a transcript of the parts of the proceedings not already on file [that] the appellant deems necessary for the proper presentation of the appeal. . . ." As we have repeatedly stated, "[o]ur role is not to guess at possibilities, but to review claims based on a complete factual record . . . . If an appellant fails to provide an adequate record, this court may decline to review the appellant's claim." (Citation omitted; internal quotation marks omitted.) *Berger* v. *Deutermann*, 197 Conn. App. 421, 427, 231 A.3d 1281, cert. denied, 335 Conn. 956, 239 A.3d 318 (2020). On the basis of the record before us, we simply have no way to assess whether, as the plaintiff claims, the jury's verdict was "palpably against the evidence." Because the plaintiff failed to meet her burden of providing us with an adequate record for review, we do not consider the plaintiff's first claim.

We also decline to review the plaintiff's second claim regarding the court's denial of the original plaintiff's request for supplemental jury interrogatories because that claim is inadequately briefed. "We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . It is not enough merely to mention a possible argument in the

most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." (Internal quotation marks omitted.) *Bisson* v. *Wal-Mart Stores, Inc.*, 184 Conn. App. 619, 642, 195 A.3d 707 (2018). The scant seven sentences devoted to this claim in the plaintiff's brief are devoid of any cogent analysis and contain no discussion or citation to any relevant legal authority. Accordingly, we deem the plaintiff's second claim abandoned.

The judgment is affirmed.